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REDACTED – FOR PUBLIC INSPECTION

October 13, 2015

By ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

**Re: Applications of Charter Communications, Inc., Time Warner Cable Inc., and
Advance/Newhouse Partnership for Consent to Assign or Transfer Control of
Licenses and Authorizations, MB Docket No. 15-149**

Dear Ms. Dortch:

In accordance with the *Protective Order* in the above-captioned proceeding,¹ DISH Network Corporation (“DISH”) hereby submits the attached public, redacted version of its Petition to Deny. DISH has denoted with “{{**BEGIN HCI** **END HCI**}}” symbols where Highly Confidential Information has been redacted. The designated Highly Confidential Information in the Petition was taken from or derived from Highly Confidential Information in the Applicants’ filings. A Highly Confidential version of this Petition is being simultaneously filed with the Commission and will be made available pursuant to the terms of the *Protective Order*.

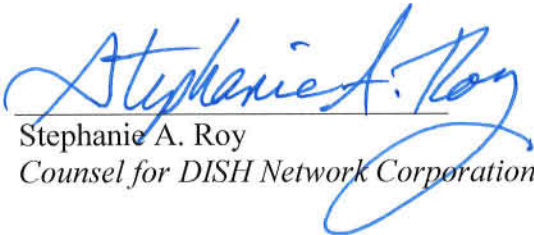
¹ Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 15-149, Protective Order, DA 15-110 (Sept. 11, 2015) (“*Protective Order*”).

Marlene H. Dortch
October 13, 2015
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Please contact me with any questions.

Respectfully submitted,

A handwritten signature in blue ink, reading "Stephanie A. Roy".

Stephanie A. Roy
Counsel for DISH Network Corporation

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Applications of)	MB Docket No. 15-149
)	
Charter Communications, Inc., Time)	
Warner Cable Inc., and)	
Advance/Newhouse Partnership)	
)	
For Consent to Assign or Transfer Control)	
of Licenses and Authorizations)	

PETITION TO DENY OF DISH NETWORK CORPORATION

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October 13, 2015

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Exhibit A: Standalone Broadband Condition

Exhibit B: Declaration of Roger J. Lynch

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**Before the
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PETITION TO DENY OF DISH NETWORK CORPORATION

DISH Network Corporation (“DISH”)¹ respectfully submits this Petition to Deny the above-referenced acquisition of Time Warner Cable Inc. (“TWC”) and Bright House Networks (“BHN”) by Charter Communications, Inc. (“Charter”) (collectively, the “Applicants”).² Charter, TWC, and BHN have not demonstrated, based on their Application,³ that the merger would serve the public interest.

¹ Subsidiaries of DISH include a multichannel video programming distributor (“MVPD”) and an online video distributor (“OVD”), both of which compete with Charter, TWC, and BHN. Online video is sometimes also referred to as over-the-top (“OTT”) video in the Petition. For these and other reasons described herein, DISH is a party in interest under Section 309(d)(1) of the Communications Act. *See* 47 U.S.C. § 309(d)(1).

² *See* Public Notice, Commission Seeks Comment on Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 15-149, DA 15-1010 (Sept. 11, 2015).

³ *See* Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, Applications, Public Interest Statement, MB Docket No. 15-149 (June 25, 2015) (“Charter-TWC Application”).

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I. INTRODUCTION AND SUMMARY

By and large, the proposed transaction would be no better for the public interest than the one proposed between Comcast and TWC. The same principles and methods for defining relevant markets and evaluating the transaction's impact on competition in these markets are equally applicable here. Charter and TWC's application leads to the same conclusion: the merger would permit and motivate the combined company to hurt or destroy online video rivals, including the Sling TV OTT video service, through its control over the broadband pipe. The merger would also enable the combined company to harm the broadband-reliant services provided by MVPDs. The combined new Charter ("New Charter") would serve almost 30 percent of the homes in the United States that have broadband speeds of at least 25 Mbps ("high-speed").⁴

The Commission's General Counsel, Jonathan Sallet, recently acknowledged the importance of protecting competition and innovation by OTT video providers, noting that "entrants are particularly vulnerable when competition is nascent" and that, in reviewing mergers, the Commission is particularly concerned about a company's "incentive and its ability to disadvantage [online video distributors ("OVDs")] and thus retard or permanently stunt the growth of a competitive OVD industry."⁵ As Chairman Wheeler has explained, the Commission's reluctance to approve the Comcast/TWC deal was premised, among other things, on the fact that Comcast's post-merger market share "would have posed an unacceptable risk to

⁴ Charter-TWC Application at 6 n.10.

⁵ Jonathan Sallet, FCC, Remarks at the Telecommunications Policy Research Conference: The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews, at 2 (Sept. 25, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0925/DOC-335494A1.pdf ("Sallet Remarks").

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competition and innovation especially given the growing importance of high-speed broadband to online video and innovative new services.”⁶

These concerns are no less present in this transaction. Some of them are in fact even more acute:

First, this transaction will create a suffocating duopoly. True, the combined Comcast/TWC would have served an even greater proportion of high-speed homes than New Charter. But where Comcast/TWC would have created one behemoth, this transaction will result in two broadband providers controlling about 90 percent of the nation’s high-speed broadband homes between them.⁷ They will not need to collude in order to bring their collective weight to bear on an OVD. Parallel foreclosures, with one of the two following the other, would be enough for an OVD to be shut off from most of the high-speed homes in the country.

Second, the impact of New Charter would cause a significant proportion of the combined company’s high-speed broadband subscribers to lack access to alternative high-speed broadband options. Indeed, Charter admits that almost two thirds of households in the New Charter footprint will not have access to at least one alternative high-speed broadband provider.⁸ For these customers, switching ISPs is not just an inconvenience, but an impossibility.

⁶ Statement from FCC Chairman Tom Wheeler on the Comcast-Time Warner Cable Merger (Apr. 24, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-333175A1.pdf.

⁷ This percentage is based on the most recent publicly available data from December 2013. *See* Declaration of Roger J. Lynch, Executive Vice-President, Advanced Technologies and International Group for DISH and CEO of Sling TV ¶ 19 (Oct. 13, 2015) (“Lynch Declaration”) (attached hereto as Exhibit B).

⁸ Charter-TWC Application at 60. According to the Applicants, “more than one in three households in the New Charter footprint already had access to at least one wireline alternative (in addition to the merging firms) offering download speeds of 25 Mbps or faster,” meaning that almost two in three do not have an alternative.

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Third, the systems of the two Applicants abut each other to a much greater extent than those of Comcast and TWC. This means greater loss of potential competition, as well as “benchmarking” opportunities, compared to the failed Comcast/TWC transaction.

Significantly, as in the Comcast transaction, New Charter would have a panoply of foreclosure techniques at its disposal. It would be able to foreclose or degrade the online video offerings of competing MVPD and OTT video providers at any of three “choke points”: (1) the points of interconnection to the combined company’s broadband network, in effect the “on ramp” to the New Charter network; (2) the “public Internet” portion of the pipe to the consumer’s home; and (3) managed or specialized service channels, which can act as super-HOV-lanes and squeeze the capacity of the “public Internet” portion of the New Charter broadband pipe. In addition, New Charter would have increased leverage that it could use to coerce third-party content owners and programmers to withhold online rights from online video platforms, thereby stifling a source of competition and innovation in the video industry.

New Charter’s enlarged ability to harm competing OVDs would give it a heightened incentive to do so, in order to help its own video business. Indeed, Department of Justice (“DOJ”) Assistant Attorney General for the Antitrust Division, Bill Baer, recently confirmed that “cable companies are essential gatekeepers to what customers watch and how they watch it.”⁹ The Applicants counter that New Charter will care more about its broadband business than about its linear cable service, and that New Charter would lose broadband subscribers if it degrades OVDs that consumers want to reach through its broadband connections. This sounds familiar because it is. The same claims were debunked in the Comcast proceeding for one simple reason:

⁹ See Prepared Remarks of Bill Baer, Assistant Attorney General Antitrust Division U.S. Department of Justice, Video Competition: Opportunities and Challenges, at 1 (Oct. 9, 2015), <http://www.justice.gov/opa/file/782401/download> (“Baer Remarks”).

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it is extremely difficult to leave a high-speed broadband ISP, and few customers ever do. The churn data submitted by Charter show this difficulty already. But the data provided are still deficient because they are not broken down into categories of churn. The Applicants must supply the all-important voluntary churn data that will permit the full evaluation of the supposed risk to their broadband business if they were to foreclose competing OVDs.

The Applicants' second line of defense is that New Charter will be restrained from hurting OVDs by the existing open Internet rules and its commitment to observe a subset of these rules for a rather fleeting three years, even if they are reversed by the courts during this three-year period. But neither the subset of rules cherry-picked by the Applicants, nor even the open Internet rules in place today, would be adequate to rein in the behavior of New Charter. Much of the harmful conduct whose potential the transaction will unleash is not subject to bright-line rules, but only to general conduct standards. New Charter's conduct at each of the three choke points, and especially at the interconnection point, can often be (or be presented as) neither black nor white, but rather a shade of grey under these standards. Disputes arising under them will inevitably take time to resolve. Even if the OVD or consumer is vindicated, a promise not to do it again is not a substitute for not having the opportunity to do it in the first place, particularly since OVDs are fragile as they try to grow into maturity.

The proposed combination also evokes Comcast/TWC in its presentation of the supposedly large benefits that would flow from it. Once more, TWC is presented as the cable industry's helpless patient, hoping for cure from its merger partner of the moment. But this notion is simply not supported by the facts. The supposed result of Charter's investment in TWC's systems is a minimum speed of 60 Mbps in three years from closing. This is probably

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less ambitious than what TWC has planned to achieve by itself without the merger. The Applicants have the burden of demonstrating otherwise.

DISH does not believe that the anticompetitive effects of this transaction, described in detail below, can be adequately mitigated by conditions. DISH further believes that these inadequacies will be proven after the harm is done. But if the Commission were to disagree, any conditions should, at a minimum, include the ability of third parties, including OVDs, to purchase broadband access wholesale from New Charter and resell it to the public. Such a wholesale condition is particularly necessary because a super-majority of New Charter households would not have any other high-speed broadband option. Such a condition can be based on the condition imposed by the Commission in the *AOL/Time Warner* transaction, with some adjustments to ensure that it will inject competition for the provision of broadband access services in New Charter's areas, and that New Charter will find it difficult to sabotage competing ISPs using its lines.

The Commission should moreover prohibit New Charter from restricting the ability of third-party programmers to grant online rights to OVDs. In addition, to potentially mitigate New Charter's ability to abuse its position as a dominant video and broadband provider, the Commission should require, at a minimum, New Charter to unbundle its broadband services in two ways: (1) by offering residential customers standalone broadband services; and (2) by offering residential customers synthetic bundles that include New Charter's broadband services and competing MVPD and OVD services. The Commission also should require the Applicants to abide by the *Open Internet Order* in its entirety, regardless of whether it is overturned in court. And, all of the above conditions should extend for seven years, not three as Charter has proposed.

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In short, this merger would empower New Charter to degrade the performance of rival OVDs and MVPDs in the knowledge that it is either extremely unlikely or downright impossible for New Charter's broadband subscribers to punish it by migrating to another high-speed ISP. As presented by the Applicants, the Commission should deny this merger.

II. STANDARD OF REVIEW

Pursuant to Section 310(d) of the Communications Act ("the Act"), the Commission must determine whether the proposed transaction will serve "the public interest, convenience, and necessity."¹⁰ This requires an evaluation of whether the transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes, as well as an assessment of whether the transaction complies with applicable laws and regulations.¹¹

There are three essential aspects of the Commission's standard of review relevant to this transaction: First, the Commission must satisfy itself that the transaction passes muster both under antitrust principles and the Commission's own broader, public interest mandate. Second, the Applicants must prove that the transaction will serve the public interest, convenience, and

¹⁰ 47 U.S.C. § 310(d); *see also Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4247 ¶ 22 (2011) ("Comcast-NBCU Order").

¹¹ *See Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee, Memorandum Opinion and Order and Report and Order*, 23 FCC Rcd. 12348, 12363-64 ¶ 30 (2008) ("Sirius-XM Order"); *News Corp. and the DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, for Authority to Transfer Control, Memorandum Opinion and Order*, 23 FCC Rcd. 3265, 3276-77 ¶ 22 (2008) ("Liberty Media-DIRECTV Order"); *SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order*, 20 FCC Rcd. 18290, 18300-01 ¶ 16 (2005) ("SBC-AT&T Order").

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necessity. Third, it is not enough for the Applicants to prove that the transaction will not be harmful to competition; rather, they must prove that it would benefit competition.

The Commission's public interest determination encompasses the "broad aims of the Communications Act,"¹² which include a "deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, [and] ensuring a diversity of information sources and services to the public."¹³ As part of this comprehensive assessment, the Commission takes a close look at the proposed transaction's effect on competition. The Commission's analysis is informed by traditional antitrust principles.¹⁴ Those principles are in turn based on the Clayton Act's prohibition on transactions that substantially lessen competition or tend to create a monopoly in any line of commerce,¹⁵ as well as the Federal Trade Commission ("FTC") Act's provision directing the

¹² *Comcast-NBCU Order*, 26 FCC Rcd. at 4248 ¶ 23; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, Memorandum and Order*, 15 FCC Rcd. 9816, 9821 ¶ 11 (2000) ("AT&T-MediaOne Order").

¹³ *Comcast-NBCU Order*, 26 FCC Rcd. at 4248 ¶ 23.

¹⁴ *See id.* ¶ 24; *see also* Jonathan Sallet, *FCC Transaction Review: Competition and the Public Interest*, OFFICIAL FCC BLOG (Aug. 12, 2014), <http://www.fcc.gov/blog/fcc-transaction-review-competition-and-public-interest> ("[T]he FCC's actions should be informed by competition principles[,] . . . [b]ut, the 'public interest' standard is not limited to purely economic outcomes.") ("Sallet Blog"); *Sirius-XM Order*, 23 FCC Rcd. at 12365 ¶ 32; *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3278 ¶ 24; *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order*, 19 FCC Rcd. 21522, 21544-45 ¶ 42 (2004); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Authorizations and Application to Transfer Control of a Submarine Landing License, Memorandum Opinion and Order*, 15 FCC Rcd. 14032, 14046-47 ¶ 23 (2000) ("Bell Atlantic-GTE Order").

¹⁵ *See* 15 U.S.C. § 18.

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FTC to stop anti-competitive practices in their incipency.¹⁶ The Horizontal Merger Guidelines issued jointly by the Justice Department and the FTC build upon those rules. The antitrust agencies must “interdict competitive problems in their incipency” by identifying and preventing mergers that are likely to result in highly concentrated markets.¹⁷

Where a merger is substantially likely to result in a significant reduction in the number of competitors and increase in market concentration, the Horizontal Merger Guidelines require applicants to demonstrate that “extraordinarily great cognizable efficiencies” exist to rebut the agency’s presumption that the merger will enhance market power.¹⁸ The antitrust agencies are not required to define potential anti-competitive effects with certainty in order to challenge a merger as unlawful.¹⁹ Likewise, the Non-Horizontal Merger Guidelines direct the Justice Department to scrutinize closely those vertical mergers that could decrease the number of other similarly situated firms, and increase market concentration, market share, and the difficulty of

¹⁶ See *id.* § 45 (“The Commission is hereby empowered and directed to prevent [parties] . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”); *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966) (citing *F.T.C. v. Motion Picture Advert. Servs. Co.*, 344 U.S. 392, 393-94 (1953) (“It is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipency acts and practices which, when full blown, would violate those Acts . . . as well as to condemn as ‘unfair methods of competition’ existing violations of them.”)).

¹⁷ DOJ and FTC, Horizontal Merger Guidelines § 1 (2010), <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> (“*Horizontal Merger Guidelines*”).

¹⁸ *Id.* § 10; see also *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001) (“[H]igh market concentration levels . . . require, in rebuttal, proof of extraordinary efficiencies Moreover, given the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those ‘efficiencies’ represent more than mere speculation and promises about post-merger behavior.”).

¹⁹ See *Horizontal Merger Guidelines* § 1.

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market entry.²⁰ In particular, the Justice Department should challenge vertical mergers that may allow the merging firms to arbitrarily inflate the prices of internal transactions, pass along those costs to consumers, and effectively preempt adjacent markets.²¹

Crucially, however, the Commission's competitive analysis is not limited by these principles. Doing no harm is first, but not last for the Commission. Since the agency must find that a transaction serves affirmatively the public interest before approving it, it must determine "whether a transaction will enhance, rather than merely preserve, existing competition,"²² and whether the merger will accelerate the decline of market power by dominant firms in relevant communications markets.²³ The Commission's General Counsel put it aptly in recent remarks: "At the FCC, in every transaction review, the burden is on the applicants to demonstrate that a transaction will further the public interest, and that starts with competition. A central question always is: Will a deal bring more competition for the benefit of American consumers?"²⁴

²⁰ See DOJ, Non-Horizontal Merger Guidelines §§ 4-4.2 (2006), <http://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf>.

²¹ See *id.* at § 4.23 (characterizing acquisitions by a regulated utility of a supplier of its fixed or variable inputs as creating "substantial opportunities for . . . abuses.").

²² *Comcast-NBCU Order*, 26 FCC. Rcd. at 4248 ¶ 24; see also *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14047 ¶ 23; *Application for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, Memorandum Opinion and Order*, 17 FCC Rcd. 23246, 23256 ¶ 28 (2002) ("Comcast-AT&T Order"); *AT&T Corp., British Telecommunications, PLC, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, Memorandum Opinion and Order*, 14 FCC Rcd. 19140, 19147-48 ¶ 15 (1999) ("AT&T Corp.-British Telecom Order").

²³ *AT&T-MediaOne Order*, 15 FCC Rcd. at 9821 ¶ 10; see also *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, Memorandum Opinion and Order* 12 FCC Rcd. 12 FCC Rcd. 19985, 20035-36 ¶ 95 (1997).

²⁴ Sallet Remarks at 2.

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Just as important, the Commission's public interest standard "is not limited to purely economic outcomes," as "it necessarily encompasses the 'broad aims of the Communications Act.'"²⁵ On the competition front, the Commission must "be convinced that [a transaction] will enhance competition" in order to find that a merger is in the public interest.²⁶

Here, the Applicants have not come close to making that showing. The answer to the "central question" articulated by the Commission's General Counsel, "[w]ill a deal bring more competition for the benefit of American consumers," is no.²⁷

III. ROBUST, COMPETITIVE ONLINE VIDEO OFFERINGS CONTINUE TO DRIVE INNOVATION AND CONSUMER CHOICE IN THE OVERALL VIDEO MARKET

More than ever, the emerging online video market provides consumers with competitive choice in their viewing options. The Commission confirmed as much, given that protecting the growth in competitive online video was an underpinning of its proposed denial of the Comcast/TWC merger. For their part, the DISH family of companies continue to innovate and expand their own online video features with a suite of different broadband-powered technologies that serve as complements to its satellite TV service. DISH has also invested in a standalone

²⁵ Sallet Blog (*citing Sirius-XM Order*, 23 FCC Rcd. at 12364 ¶ 31); *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3277-78 ¶ 23; *Comcast-AT&T Order*, 17 FCC Rcd. at 23256 ¶ 28; *AT&T Corp.-British Telecom Order*, 14 FCC Rcd. at 19147-48 ¶ 15) (explaining the "broad aims of the Communications Act" include "among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, [and] ensuring a diversity of information sources and services to the public."); *see also Comcast-NBCU Order*, 26 FCC Rcd. at 4248 ¶ 24.

²⁶ *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, Memorandum Opinion and Order*, 14 FCC Rcd. 14712, 14738 ¶ 49 (1999) ("*Ameritech-SBC Order*") (*citing Bell Atlantic-NYNEX Order*, 12 FCC Rcd. at 19987 ¶ 2).

²⁷ Sallet Remarks at 2.

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OTT service that serves as a substitute for a traditional MVPD subscription. It cannot be disputed that OTT services will become even more important as consumers expand their viewing habits beyond traditional TV platforms. DISH is making investments to meet these changing consumer preferences and hopes to be in a position to continue these investments.

DISH's initiatives track a broader industry trend. MVPDs increasingly offer their own online and on-demand features that serve as complements to traditional pay-TV service. At the same time, companies like Netflix, Amazon, HBO, Sony and others continue to develop compelling libraries of content for streaming and on-demand delivery to serve, at a minimum, as complements to, and often also as substitutes for, traditional pay-TV packages.

A. DISH Network L.L.C. ("DISH Network") Has Invested Heavily in Consumer-Friendly, Broadband-Powered Video Products That Are Complementary to Its Satellite TV Packages and Crucial to Its Ability to Compete

1. The DISH Network Satellite TV Service Is Complemented by Broadband-Powered Services in Order to Remain Competitive

The DISH Network satellite TV service enjoys a long history of success in the MVPD market, and in recent years, its offerings have expanded to include several types of online and on-demand video features that complement its traditional satellite pay-TV packages. We view these online video features as an important component of our competitive MVPD service.²⁸ *All of these features, however, rely on a broadband Internet connection of sufficient speed and quality.*²⁹ The most advanced digital set-top boxes ("STBs") deployed by DISH Network now include a separate input for broadband.³⁰ In general, a subscriber must acquire broadband

²⁸ Lynch Declaration ¶ 5.

²⁹ *Id.*

³⁰ *Id.*

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Internet access service from a third-party provider, such as Charter or TWC, and connect that broadband wire into a port in the back of the STB.³¹

The broadband connection to the STB is an integral aspect of DISH Network's ability to compete in the pay-TV business today, not simply an additional feature.³² Cable enables two-way communications by storing content on servers closer to the customer's home and splitting nodes within a neighborhood to facilitate on-demand and other interactive services.³³ In contrast, satellite's point-to-multipoint architecture and lack of a return path necessitate a second connection to the STB through broadband in order to maintain the competitiveness of the DISH Network satellite TV service.³⁴

DISH Network's newest, state-of-the-art STB, the Hopper (as well as certain previous generations of DISH Network STBs) has online features that do not work without a broadband connection. The Hopper provides a DISH Network subscriber with the ability to view live or recorded programming remotely on a personal computer or wireless handheld device.³⁵ In order for the customer to view programming remotely, the customer must have a broadband connection in the home that the Hopper can use, at the customer's discretion, to send the programming over the Internet to a remote device.³⁶

³¹ *Id.*

³² *Id.* ¶ 6.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* ¶ 7.

³⁶ *Id.*

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The Hopper and other STBs in DISH Network's equipment lineup also offer Internet-delivered Video-on-Demand ("VOD").³⁷ To deliver VOD (such as television shows or movies available at any time of the customer's choosing) to the STB, DISH Network cannot rely solely on its satellite architecture because there would not be enough bandwidth on the satellite beam to carry all the necessary data to serve DISH Network's 13.932 million subscribers'³⁸ individual programming choices.³⁹ There also is not enough capacity on each individual STB to store all the movies and television shows that any given customer might want to select.⁴⁰ DISH Network therefore stores VOD titles on servers located throughout the U.S. and delivers the programs to the customer's STB through a broadband connection.⁴¹ Thus, a DISH Network subscriber might be watching live video programming from a satellite and then select an on-demand movie or television show, which arrives to the STB through the broadband connection.⁴² Once again, this home broadband connection would typically be provided by a cable broadband provider such as Charter or TWC.⁴³

DISH Network offers these broadband-powered online and VOD services to maintain the competitiveness of its service, reduce churn, and discourage "cord shaving" or "cord cutting"—

³⁷ *Id.* ¶ 8.

³⁸ DISH Network provides service to 13.932 million subscribers as of June 30, 2015. *See* DISH DBS Corp., Form 10Q Quarterly Report for the Period Ending 06/30/15, at 4 (Aug. 14, 2015), <http://files.shareholder.com/downloads/DISH/815498142x0xS1104659-15-59717/1042642/filing.pdf>.

³⁹ *See* Lynch Declaration ¶ 8.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

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consumers reducing their use of MVPD services or leaving them altogether.⁴⁴ Simply put, the broadband-powered elements of DISH Network's service ensure that it can compete more effectively in the pay-TV industry since DISH Network's competitors, including Charter and TWC, all offer similar online services.⁴⁵

Without the broadband-powered features of DISH Network's offerings, DISH Network's service would fail to meet consumers' desire for online video and fall behind cable competitors that are able to use their own infrastructure to address this need (*i.e.*, providers that use their own connection to the STB to deliver both traditional video and broadband connectivity).⁴⁶ The importance of broadband-powered functionality is necessary today and will only become more critical in the future in order for DISH Network to remain competitive in the pay-TV and online video industries.⁴⁷

2. Sling TV, a Standalone OTT Service, Competes as a Substitute for Traditional Pay-TV Services

Earlier this year, Sling TV, a new, domestic, OTT live streaming video service was launched.⁴⁸ This new OTT service runs entirely over separately provisioned high-speed broadband connections, with no satellite dish required.⁴⁹ Consumers can use Sling TV as a substitute for their pay-TV subscription entirely.⁵⁰

⁴⁴ *Id.* ¶ 9.

⁴⁵ *Id.*

⁴⁶ *Id.* ¶ 10.

⁴⁷ *Id.*

⁴⁸ *Id.* ¶ 12.

⁴⁹ *Id.*

⁵⁰ *Id.*

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Unlike traditional pay-TV services, subscribing to Sling TV does not require a credit check or contract—instead, consumers access the product on a pay-as-you-go basis, making it ideally suited for those who do not have the means or desire to commit to a multi-year contract for pay-TV.⁵¹ Like other OTT services, Sling TV subscribers access their programming through any Internet-connected device, including a tablet, computer, or smart TV.⁵²

Sling TV is designed to appeal to a segment of the population that wants a slimmer package of channels at a lower price point.⁵³ Sling TV offers a variety of packages of OTT channels starting at \$20 per month.⁵⁴ The Sling TV programming portfolio includes content from Disney/ESPN, HBO, AMC, A&E, Turner, Scripps, EPIX, Univision and Maker Studios.⁵⁵ Sling Latino offers a suite of standalone and add-on Spanish-language programming packages tailored to English-dominant, bilingual, and Spanish-dominant U.S. Hispanics.⁵⁶ Sling International currently provides more than 200 channels in 18 languages across multiple devices to U.S. households.⁵⁷ Sling TV is a substitute for a traditional MVPD services, including the video offerings of Charter and TWC.⁵⁸ But, a consumer cannot enjoy Sling TV absent the ability to access the Internet through a high-speed broadband service provided by third-party providers, such as Charter and TWC.⁵⁹

⁵¹ *Id.* ¶ 13.

⁵² *Id.*

⁵³ *Id.* ¶ 14.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* ¶ 15.

⁵⁷ *Id.*

⁵⁸ *Id.* ¶ 16.

⁵⁹ *Id.*

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B. The Online Video Market Has Become a Significant Force in the Overall Video Market

DISH is not alone in believing that OTT will become even more important as consumers continue to expand their viewing habits beyond traditional TV platforms. The Assistant Attorney General for the Antitrust Division, Bill Baer, confirmed the impact of OTT on the video market, noting that “[w]ith respect to video programming, the streaming option is transformative.”⁶⁰ Indeed, the entire industry is making investments to meet these changing consumer preferences. Today, consumers can access Internet-delivered video from their pay-TV providers to complement their MVPD service, or take advantage of a variety of standalone streaming services to complement or substitute these services entirely. In the last year alone, the number of video streaming services has expanded dramatically, with more expected to expand or launch in the coming year. As a result, now more than ever, a vibrant, competitive video market relies upon high-speed, high-capacity broadband.

Today, nearly 60 percent of U.S. broadband households subscribe to an OTT video service.⁶¹ At a minimum, OTT services are complementary to a traditional pay-TV subscription, but they can also serve as substitutes for traditional pay-TV subscriptions entirely, depending on the offering.

Established OTT providers like Netflix, Amazon, and Hulu posted significant subscriber gains in 2015. In the second quarter of 2015, Netflix reported more than 65 million subscribers

⁶⁰ See Baer Remarks at 1.

⁶¹ See *Nearly 60% of U.S. Broadband Households use OTT Video Services, But “Account Sharing” is Prevalent*, PARKS ASSOCIATES (May. 5, 2015), <http://www.parksassociates.com/blog/article/cus-2015-pr11>.

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worldwide, with 42 million in the U.S. alone.⁶² From April 2014 to April 2015, Hulu subscribership grew by 50 percent to more than nine million subscribers.⁶³ By some estimates, Amazon's Prime Instant Video service has 14.5 million users.⁶⁴ Reports indicate that 13 percent of all U.S. television households use Amazon's video service,⁶⁵ with 56 percent of Amazon Prime Instant Video subscribers streaming video more than once a week.⁶⁶

In addition, during the past year, a variety of streaming services that offer consumers the ability to live stream multiple channels over a broadband connection have launched. Because they provide multiple channels of live programming, these services are substitutes for traditional pay-TV subscriptions. For example, in March 2015, Sony unveiled its PlayStation Vue streaming TV service in select cities. Sony's packages, which range from \$49.99 to \$69.99 per month, provide more than 50 channels of live television, movies, and sports.⁶⁷ Apple TV is also

⁶² See Jeff John Roberts, *Netflix Streams its Way to Another Blockbuster Quarter, Share Price Soars*, FORTUNE (July 15, 2015), <http://fortune.com/2015/07/15/netflix-q2-earnings-2015/>.

⁶³ See Jacob Kastrenakes, *Hulu Hits 9 Million Subscribers as TV and Mobile Viewing Takes Off*, THE VERGE (Apr. 29, 2015), <http://www.theverge.com/2015/4/29/8513147/hulu-9-million-subscribers>.

⁶⁴ See Jay Greene, *Amazon's Streaming-Video Service Making Gains on Netflix*, SEATTLE TIMES (Mar. 11, 2015), <http://www.seattletimes.com/business/amazon/amazons-streaming-video-service-making-gains-on-netflix/>.

⁶⁵ *Id.*

⁶⁶ See Patrick Seitz, *Amazon Prime Users on Par with Netflix for Streaming Video*, INVESTOR BUSINESS DAILY (Feb. 10, 2015), <http://news.investors.com/technology-click/021015-738690-amazon-beats-netflix-in-subscriber-video-watching.htm>.

⁶⁷ See *Plans*, PLAYSTATION NETWORK, <http://www.playstationnetwork.com/vue/plans> (last visited Oct. 9, 2015).

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reportedly in talks to provide a slimmed down bundle of channels to consumers via a broadband connection in 2016.⁶⁸

Further, over the last year a variety of programmers have rolled out standalone streaming services. Among other things, customers can access on-demand and live streaming content from these programmers, with no traditional pay-TV subscription required. These streaming options can serve as complements for customers with a traditional pay-TV subscription. But, they can also be substitutes for pay-TV subscriptions entirely, because they enable customers to “break the bundle” and access programming that was once tied to exclusively to an MVPD subscription on a standalone basis. In October 2014, CBS launched a standalone streaming service in select markets, called “CBS All Access.” This service allows viewers to live-stream CBS content, as well as provides access to a library of on-demand content in 14 markets, including New York and Los Angeles.⁶⁹ In addition, in April 2015, HBO became the first major cable channel to offer its content online, when it launched HBO Now. According to an analyst forecast, the service had approximately one million subscribers as of July 2015.⁷⁰ Also in July 2015 Showtime launched a stand-alone streaming service direct to consumers for \$10.99 per month.⁷¹

⁶⁸ Peter Burrows, Lucas Shaw, Gerry Smith, *Apple Said to Delay Live TV Service to 2016 as Negotiations Stall*, BLOOMBERG BUSINESS (Aug. 13, 2015), <http://www.bloomberg.com/news/articles/2015-08-13/apple-said-to-delay-tv-service-to-2016-as-negotiations-stall>.

⁶⁹ See Press Release, *CBS Brings Programming Direct to Consumers with New Multi-Platform Digital Subscription Service*, CBS CORPORATION (Oct. 16, 2014), <http://investors.cbscorporation.com/phoenix.zhtml?c=99462&p=irol-newsArticle&ID=1978514>

⁷⁰ See Pulkit Chandra, *HBO Now May Already Have 1 Million Subscribers, According to One Analyst*, TECHHIVE (July 1, 2015), <http://www.techhive.com/article/2943208/hbo-now-may-already-have-1-million-subscribers-according-to-one-analyst.html>.

⁷¹ Joseph Keller, *Showtime's Standalone Service Arrives on the Apple TV for \$10.99 per Month*, iMORE (July 7, 2015), <http://www.imore.com/showtimes-standalone-service-arrives-apple-tv-1099-month>.

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The growth of OTT services has led to a rise in subscribership: more than 100 million people will subscribe to a streaming video service by the end of this year, and this number is expected to pass 180 million by the end of the decade.⁷² In a recent survey about streaming video behavior, 83 percent of respondents said they stream TV and movies at home (up from 74 percent last year), while 90 percent of millennials reported streaming video in their homes.⁷³ By 2019, monthly video consumption over the Internet is expected to quadruple.⁷⁴ The rapid rise of broadband-powered online video services has been a boon for consumers in providing competition, choice and innovation. *But, this new market will be threatened by the anti-competitive effects of this proposed merger.*

IV. THE PROPOSED TRANSACTION PRESENTS COMPARABLE COMPETITIVE CONCERNS TO THE FAILED COMCAST/TWC MERGER

A. The Applicants' Arguments Are Similar to Those Made by Comcast/TWC, and Should Be Rejected When the Commission Applies the Same Transaction Review Principles

Chairman Wheeler's competition principles will guide the Commission's review of this new proposed merger:

As I have made plain on innumerable occasions, competition is paramount . . . Suffice it to say, continuing to protect and encourage a competitive marketplace is the foundational requirement of the modern FCC. Our skepticism about the competitive impact of the rumored Sprint-T-Mobile merger of a year ago, and the recently abandoned

⁷² See Max Willens, *100 Million People Streaming Video on Demand Worldwide: Have We Reached a Tipping Point?*, INTERNATIONAL BUSINESS TIMES (Sept. 29, 2015), <http://www.ibtimes.com/100-million-people-streaming-video-demand-worldwide-have-we-reached-tipping-point-1876281>.

⁷³ Joan E. Solsman, *Awash with Streaming Video? Survey Says You're Not Alone*, CNET (Oct. 29, 2015), <http://www.cnet.com/news/awash-with-streaming-video-survey-says-youre-not-alone>.

⁷⁴ Baer Remarks at 2.

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Comcast-Time Warner Cable merger are evidence that we take seriously our responsibility to protect competition.⁷⁵

The Applicants, however, do not seem to take full account of the teachings from the Commission's pro-competition precedent in general and the Comcast/TWC proceeding in particular. In fact, their competitive showing seems to be a carbon copy of the wholly inadequate showing made in that previous transaction. Among other things:

- Like Comcast, they rely on the idea of “no overlap, no problem,” even though it has been rejected by the FCC and DOJ. They give short shrift to the nationwide upstream market where broadband providers provide the access necessary for OVDs to reach their customers nationally.
- Like Comcast, they claim that consumers can simply replace the New Charter service with a service offering speeds as low as 1.5 Mbps and still be able to access their favorite OVD content. They disregard a mountain of evidence that consumers do not regard lower speed offerings as an adequate substitute for the purpose of receiving video, and much less for live, high-definition video. They also disregard the Commission's conclusion, based on that evidence, that 25 Mbps is the appropriate entry point for advanced communications services.
- Like Comcast, they argue that they care more about their high-margin broadband business than their low-margin video distribution business. Therefore, they reason, the combined company has the incentive to promote OVDs rather than hurting them even if promoting them comes at the expense of the revenue rich New Charter video business.
- But, like Comcast, they disregard the easily demonstrated fallacy of that theory: Charter's broadband subscribership depends far more on its market power and the paucity or outright unavailability of other broadband options than on the variety of online video it allows users to access. If the transaction is approved, New Charter would be able to have its cake and eat it, too: help its video business by throttling rival OVDs without hurting its broadband business, which customers rarely leave.

The following chart sets side-by-side the relevant quotes from the Charter/TWC and Comcast/TWC applications and shows that the later application mirrors the earlier one in key respects.

⁷⁵ Tom Wheeler, Chairman, FCC, Prepared Remarks at The Brookings Institution (June 26, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-334141A1.pdf.

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	What Comcast Said	What Charter Said
The relevant geographic market is local—no overlap, no problem.	<ul style="list-style-type: none"> • “[T]he transaction presents no ‘horizontal’ competitive concerns because . . . Comcast’s and TWC’s service areas are distinct and the companies do not compete in any relevant market.”⁷⁶ • “Comcast and TWC provide broadband services in different geographic areas, so there is no reduction in consumer choice as a result of this transaction.”⁷⁷ 	<ul style="list-style-type: none"> • “The Transaction raises no horizontal concerns, as the merging companies do not compete in the same geographic markets.”⁷⁸ • “Because Charter, Time Warner Cable, and Bright House Networks serve distinct geographic areas, a combination of the companies does not reduce competition” in “MVPD, broadband or voice services.”⁷⁹ • “[C]ompetition for end-users . . . takes place at a local level.”⁸⁰
Product market is not defined by any particular speed—1.5 or 3 Mbps are adequate substitutes for 25 Mbps⁸¹	<ul style="list-style-type: none"> • “[T]he combined company will face substantial competition in the provision of broadband services from a variety of sources—from providers of DSL (including FTTN), FTTP, wireless, and other types of broadband service (including cable overbuilders, satellite, and fixed 	<ul style="list-style-type: none"> • “The Applicants do not believe that broadband speeds at or above 25/3 Mbps, or wireline broadband services more generally, constitute separate relevant markets”⁸³ • “[T]he online video marketplace is not defined by any particular speed of broadband service—

⁷⁶ Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, MB Docket No. 14- 57, at 127 (Apr. 8, 2014) (“Comcast-TWC Application”); *see also id.* at 138.

⁷⁷ *Id.* at 6.

⁷⁸ Charter-TWC Application at 5.

⁷⁹ *Id.* at 42 (citation omitted).

⁸⁰ *Id.* at 44.

⁸¹ *See id.*; Comcast-TWC Application at 9-10, 14.

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	wireless)” ⁸²	different speeds are substitutes for consumers depending on their use and value preferences, and any attempt to establish a ‘national market’ at a given speed is contrary to basic economics and Commission precedent.” ⁸⁴
Broadband is more important to us than our video product, and we would not hurt OVDs because it would cost us broadband subscribers	<ul style="list-style-type: none"> • “[T]he services that edge providers offer are complementary to Comcast’s broadband business, whose value is enhanced by edge providers’ offerings . . . any action that the combined firm might undertake to harm edge providers would degrade its broadband service and reduce the profits it could earn.”⁸⁵ • “[G]iven the importance of broadband to the combined firm’s bottom line, . . . a strategy of harming broadband to help video is likely less attractive than a procompetitive alternative, in which Comcast invests to offer high quality video services (including online video services).”⁸⁶ 	<ul style="list-style-type: none"> • New Charter “will not have an incentive to prevent rival networks or OVDs from being distributed to its subscribers in order to favor its own video programming. To the contrary, we will have an increased incentive to promote OVDs and other edge providers in order to encourage usage that expands subscribership to our broadband network. Our gross margin percentages on broadband will exceed those of our video business [O]ur future success depends far more on our broadband business than our video business, and thus we will not have any incentive to take any action that harms the attractiveness of broadband to our consumers.”⁸⁷ • “[I]ncreased broadband speeds are used to attract consumers precisely because they

⁸³ Charter-TWC Application at 6 n.11.

⁸² Comcast-TWC Application at 158; *see* Industry Analysis and Technology Division, Wireless Competition Bureau, FCC, Internet Access Services: Status as of December 31, 2013, at Table 10 (Oct. 2014).

⁸⁴ *Id.* at 44.

⁸⁵ Comcast-TWC Application at 157.

⁸⁶ *Id.* at 158 (quoting Israel Decl. ¶ 39).

⁸⁷ Charter-TWC Application at 49 (internal quotations omitted).

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		<p>facilitate OVD usage—that is the primary application for such speeds. It thus makes no sense to disadvantage broadband providers that are investing in increased speeds to better compete and serve their customers by deeming them part of some distinct and wholly artificial product market.”⁸⁸</p> <ul style="list-style-type: none">• “[A]ny effort to foreclose OVDs would be directly contrary to our clear economic interest in expanding subscribership to our broadband network. Such efforts would only harm New Charter’s broadband business.”⁸⁹
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⁸⁸ *Id.* at 44 n.108.

⁸⁹ *Id.* at 46-47.

B. The Larger Size of Comcast Does Not Save this Transaction

There is, of course, one argument that the Applicants make that was not found in the Comcast/TWC application. They point out that the combined company would be smaller than Comcast is today.⁹⁰ This fact is cold comfort to OVDs and the public for a number of important reasons.

First, Comcast's size is far from a seal of approval for any merger that creates a broadband provider up to that size. Comcast attained its commanding position in the industry by means of two large transactions—the acquisition of the TCI/AT&T systems in 1999⁹¹ and the split of Adelphia's systems between Comcast and TWC in 2006.⁹² But both of these transactions preceded the revolution of competitive OTT video services, which, as explained above, both rely on high-speed broadband services to reach consumers and also compete against cable and telephone ISPs' video services for their mutual subscribers' attention and money.⁹³ In fact, the

⁹⁰ See, e.g., Charter-TWC Application at 46 (“New Charter would serve fewer than 30 percent of national broadband customers and a smaller number than Comcast serves today.”); *id.* at 5 (“... Comcast will remain by far the largest player.”); *id.* at 6 (“New Charter will have at least 2.5 million fewer broadband subscribers than Comcast serves *today*.”) (emphasis in original); *id.* at 45 (“New Charter will still be the number two broadband provider behind Comcast . . .”).

⁹¹ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, Memorandum Opinion and Order*, 14 FCC Rcd. 3160, 3234 ¶ 154-55 (1999) (“AT&T-TCI Merger Order”).

⁹² See *Applications for Consent to the Transfer of Control of Licenses Adelphia Commc'ns Corp., (and Subsidiaries, Debtors-in-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees Adelphia Commc'ns Corp., (and Subsidiaries, Debtor-in-Possession), Assignors and Transferors, to Comcast Corp. (Subsidiaries), Assignees and Transferees Comcast Corp., Transferor, to Time Warner Inc., Transferee Time Warner Inc., Transferor, to Comcast Corp., Transferee, Memorandum Opinion and Order*, 21 FCC Rcd. 8203, 8217-18 ¶ 23 (2006) (“Adelphia Order”).

⁹³ Netflix's streaming service did not formally launch until 2007. *Company Overview: A Brief History of the Company that Revolutionized Watching of Movies and TV Shows*, NETFLIX,

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Commission's *TCI/AT&T Order* does not mention online video services as even on the horizon. And the Commission's *Adelphia Order*, while later in time by over half a decade, barely notes the existence of Netflix.⁹⁴ Had OTT video services been as prevalent and significant to the video marketplace at the time of those transactions as they are today, it is questionable whether the Commission would have permitted Comcast to achieve its current size and market power.

Second, New Charter's control of one third of the nation's high-speed broadband connections gives them substantial power to sabotage OVDs. This is especially the case given that almost two thirds of homes in New Charter's service area would *not* have access to a competing high-speed ISP. Thus, the loss of one third of the nation's homes could severely harm OVD competition, if not cripple it.

Finally, the substantial high-speed broadband connections that New Charter would control tells only half the story. The merger would also result in a duopoly: together, New Charter and Comcast would control access to the vast majority—likely close to 90 percent—of the nation's high-speed subscribers.⁹⁵ The implications of this duopoly for the public interest are discussed below.

<https://pr.netflix.com/WebClient/loginPageSalesNetWorksAction.do?contentGroupId=10477> (last visited Oct. 11, 2015).

⁹⁴ In *Adelphia*, Free Press had argued that "Comcast and Time Warner might block their customers' access to non-affiliated providers of VoIP (such as Vonage) and video programming competitors (such as TiVo or Netflix) and has blocked e-mail traffic." *Adelphia Order*, 21 FCC Rcd. at 8295 ¶ 213. It is telling that online video, then in its embryonic non-high-definition stage, was listed after Voice over Internet Protocol ("VoIP") and treated as VoIP's equivalent despite the gaping chasm in bandwidth between the two services that has opened up since. At most, online video was at the edge of the radar screen, and it is no wonder that the Commission accepted the Applicants' assurances that they would do no harm in that case. *Adelphia Order*, 21 FCC Rcd. at 8298 ¶ 220.

⁹⁵ See Lynch Declaration ¶ 19. The 90 percent figure was calculated using publicly available sources. According to the most recent report from the FCC (based on 2013 data), 29.4 million consumers subscribe to 25/3+ Mbps services. *Inquiry Concerning the Deployment of Advanced*

C. This Transaction Risks Creating a Broadband Duopoly

This transaction will result in two broadband providers controlling virtually all the nation's high-speed broadband homes—likely close to 90 percent—between them.⁹⁶ According to the most recent publicly available data, there are 29.4 million high-speed households in the United States as of December 2013.⁹⁷ Of these 29.4 million high-speed homes, 18.6 million were served by Comcast,⁹⁸ while 8.8 million were served by the Applicants here.⁹⁹ Therefore, 27.4 million of the country's 29.4 million high-speed broadband homes would be controlled by two companies as a result of this transaction, based on data from 2013.¹⁰⁰

Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Implemented by the Broadband Data Improvement Act, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375, at 28, Chart 1 (Feb. 4, 2015) (“2015 Broadband Progress Report”) (reporting the 25/3+ Mbps subscriber total for 2013 as 29.4 million subscribers). Charter has stated New Charter will serve “less than 30%” of the country's 25/3+ Mbps customers. This is approximately 8,820,000 subscribers ($30\% \times 29,400,000 = 8,820,000$). Comcast has stated that the “over 90%” of its subscribers have 25/3+ Mbps or faster service. David L. Cohen, *Traveling to the Tar Heel State to Talk About Media Democratization and What the TWC Deal Means for North Carolina*, Comcast Voices (Mar. 25, 2015), <http://corporate.comcast.com/comcast-voices/traveling-to-the-tar-heel-state-to-talk-aboutmediademocratization-and-what-the-twc-deal-means-for-north-carolina> (“[O]ver 90% of our customers subscribe to speeds of 25 Mbps or higher. . . .”). DISH has therefore assumed that 90% of Comcast's total broadband subscribers for 2013 received 25/3+ Mbps service. This is approximately 18,595,800 million subscribers ($90\% \times 20,662,000 = 18,595,800$). Press Release, 2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013, Leichtman Research Group (Mar. 17, 2014), <http://www.leichtmanresearch.com/press/031714release.html> (reporting Comcast had 20,662,000 subscribers by the end of 2013). When New Charter's and Comcast's 25/3 Mbps+ subscribers are combined, they equal 27,415,800 households, or over 90% of the 25/3 Mbps+ market ($(8,820,000 + 18,595,800)/29,400,000 = 93\%$).

⁹⁶ Lynch Declaration ¶ 19.

⁹⁷ See *id.*; 2015 Broadband Progress Report at 28, Chart 1.

⁹⁸ Lynch Declaration ¶ 19.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

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Accounting for 2014 growth in high-speed households could increase the number of total high-speed households and thus may decrease the share held by the two companies, but this share is still likely to be close to 90 percent.¹⁰¹ Indeed, using the Applicants' own high-speed subscriber figures and methodology for updating the 2013 total households number, Comcast and New Charter would control more than {{**BEGIN HCI** **END HCI**}} percent of the nation's high-speed households between them.¹⁰² This is almost {{**BEGIN HCI** **END HCI**}} percent more than the percentage of the nation's high-speed households that the two largest high-speed providers, Comcast and TWC, control today.¹⁰³

To better understand the implications of this transaction for OVDs, the Commission should issue document requests or provide more recent data for the number of high-speed broadband homes as of 2014. The Applicants also have the burden of disputing the data regarding broadband concentration. However, based on the data available today, the risk that this transaction will create a duopoly is staggering.

¹⁰¹ *Id.*

¹⁰² The Applicants note that, as of the end of 2014, Charter, TWC, and BHN had {{**BEGIN HCI** **END HCI**}} high-speed subscribers, respectively. *See* Charter-TWC Application at 6 n.10. The Applicants then estimate total high-speed subscribers in the U.S. for 2014 by adding each of the Applicant's high-speed subscriber gains for the year to the national high-speed subscriber number from 2013. This results in an estimated {{**BEGIN HCI** **END HCI**}} U.S. high-speed subscribers for 2014. As for Comcast, applying the 90% to Comcast's 2014 broadband subscriber base of 21.96 million households would yield 19.76 million high-speed subscribers as of the end of 2014. New Charter and Comcast between them would therefore control {{**BEGIN HCI** **END HCI**}} percent of the nation's high-speed homes ({{**BEGIN HCI** **END HCI**}}). *See* Press Release, 3 Million Added Broadband from Top Providers in 2014, Leichtman Research Group (Mar. 5, 2015), <http://leichtmanresearch.com/press/030515release.html> (reporting total broadband subscribers at the end of 2014 as 21,962,000 for Comcast and 12,253,000 for TWC).

¹⁰³ {{**BEGIN HCI** **END HCI**}}).

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Why is this a problem? The answer is far more than the fear of collusion. Both New Charter and Comcast likely know better than to collude when doing so is not necessary. And it would not be. The deal creates the risk of either unilateral action undertaken simultaneously by the two largest broadband providers, or consciously parallel action, with either Comcast leading and New Charter following or the other way around. Foreclosure action against a national OVD could certainly be covert. But it could also easily be made overt and notorious. In the latter case, the action by one of the two would shine a bright light on the path for the other to follow. The Netflix degradation incident is a case in point: as illustrated in the graph below, Comcast and TWC paralleled each other's throttling of Netflix traffic between June 2013 and September 2014, with each company's throttling reaching its peak at the same time (December 2013 to January 2014).¹⁰⁴

¹⁰⁴ ISP Speed Index, NETFLIX, <http://ispspeedindex.netflix.com/country/us/?range=&providers=393&providers=399&datefrom=2014-09&dateto=2013-03#> (last visited Oct. 10, 2015); *see* Declaration of Ken Florance, MB Docket No. 14-57, ¶ 59 (Aug. 25, 2014), (attached to Netflix, Inc., Petition to Deny, MB Docket No. 14-57 (Aug. 27, 2014)) (“[T]he network traffic exchange community is small After Netflix concluded its interconnection agreement with Comcast, it became well known among network traffic exchange circles that Netflix had paid Comcast’s terminating access fee. TWC, Verizon, and AT&T also had demanded payment.”).



The result here? Foreclosure by the two largest MVPDs if the deal is approved would kill an OVD such as Sling TV much faster and more definitely than foreclosure by the two largest broadband providers today, since it would lead to greater losses and cut off more decisively any hope of reaching break-even.¹⁰⁵ Specifically, if the merger is not consummated, the two largest high-speed ISPs would be Comcast and TWC, thus excluding the high-speed homes served by Charter and BHN.¹⁰⁶

The difficulty of detecting and preventing such behavior is one of the serious antitrust concerns raised by mergers to duopoly, like this one. As the D.C Circuit has explained:

The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices Tacit coordination is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws. It is a central

¹⁰⁵ Lynch Declaration ¶ 20.

¹⁰⁶ *Id.*

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object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.¹⁰⁷

Indeed, antitrust agencies have challenged multiple mergers that would have resulted in duopolies with market shares at or below those at issue here, including the merger of the second and third leading providers of tax preparation software, which would have given the combined firm and its market-leading competitor a collective 90 percent share of their market,¹⁰⁸ and the merger of InBev with Modelo, which would have given the combined firm and its largest competitor a 72 percent aggregate market share.¹⁰⁹ In both cases the focus was not only on decreased competition but also on the increased potential for pricing coordination as a result of the merger.¹¹⁰

As discussed above, New Charter and Comcast would far exceed the courts tolerance threshold: the two behemoths would control the vast majority, likely close to 90 percent, of the nation's high-speed broadband homes. In addition, the effects of coordination among these providers would be highly pronounced given the high barriers to entry and lack of competition that characterize broadband access: "the combination of a concentrated market and barriers to entry is a recipe for price coordination."¹¹¹

¹⁰⁷ *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001) (upholding FTC challenge to merger that would have given firm 32 percent of the market, and would have created a duopoly controlling 97 percent of the market) ("*Heinz*"); *id.* ("As far as we can determine, no court has ever approved a merger to duopoly under similar circumstances.")

¹⁰⁸ Memorandum Opinion, *United States v. H&R Block et al.*, No. 1:11-cv-00948, at 5 (Nov. 10, 2011).

¹⁰⁹ Complaint, *United States v. Anheuser-Busch InBEV SA/NV et al.*, No. 1:13-cv-00127 ¶¶ 1-2 (Jan. 31, 2013).

¹¹⁰ See *H&R Block* at 5-6, 60-67; *Anheuser-Busch* ¶¶ 2, 45-47.

¹¹¹ *Heinz*, 246 F.3d at 724.

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In addition, Charter also faces little competition from other broadband providers in its franchise areas. Close to two thirds of the combined company's high-speed homes will not have another high-speed option.¹¹²

This transaction can lead to a loss of competition in yet another respect: Charter and TWC abut or neighbor one another to a significant degree. This has two implications. The threat of overbuilding, which will be eliminated by the deal, is much more tangible; and the competitive pressure from "benchmarking" that each Applicant's prices exact on the other's conduct are much more intense. Today, TWC's behavior is constrained by its subscribers' knowledge of what Charter charges down the block. After the merger, that pressure would disappear.

V. THE APPLICANTS HAVE NOT MET THE BURDEN OF PROVING THE TRANSACTION WILL PRODUCE PUBLIC BENEFITS

A. The Applicants Bear the Burden of Proving that the Merger Will Produce Public Benefits

The Applicants bear the burden of proving that the proposed transaction serves the public interest¹¹³ by demonstrating that the competitive harms that could result from the proposed transaction are outweighed by the claimed benefits.¹¹⁴ But, those benefits must be:

¹¹² The Applicants try to distinguish the import of this statement when they say that "more than one in three households in the New Charter footprint already had access to at least one wireline alternative (in addition to the merging firms) offering download speeds of 25 Mbps or faster." Charter-TWC Application at 60. This statement confirms that close to two thirds of New Charter's service area will not have a competitive option for high-speed broadband.

¹¹³ See *Comcast-NBCU Order*, 26 FCC Rcd. at 4247 ¶ 22 (citing *Sirius-XM Order*, 23 FCC Rcd. at 12364 ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3277 ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd. at 18300 ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd. at 23255 ¶ 26).

¹¹⁴ See *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, Staff Analysis and Findings*, 26 FCC Rcd. 16184, 16190 ¶ 5 (2011) ("AT&T-T-Mobile Analysis").

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1. transaction specific—likely to occur as a result of the transaction but unlikely to be realized by other practical means having fewer anti-competitive effects;¹¹⁵
2. verifiable—both in likelihood and magnitude;¹¹⁶ and
3. for the benefit of consumers, and not solely for the benefit of the company.¹¹⁷

The Commission calculates the magnitude of the claimed benefits and the net cost of achieving them, and then employs a “sliding scale approach,” under which the Applicants’ demonstration of benefits must reveal a higher degree of magnitude and likelihood than the Commission would otherwise demand where, as here, the potential harms are both substantial and likely.¹¹⁸ If the Commission is unable to find that the alleged benefits outweigh the likely harms, or if there remain substantial and material questions of fact outstanding, the Commission must designate the application for a hearing.¹¹⁹ “The public interest standard . . . considers whether a firm will bring better products, other new innovations, or wider deployment to consumers. And it is concerned with more than just standard economic analysis. Diversity,

¹¹⁵ See *AT&T-T-Mobile Analysis*, 26 FCC Rcd. at 16247-49 ¶¶ 124-28 (“Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger.”).

¹¹⁶ See *Comcast-NBCU Order*, 26 FCC Rcd. at 4330-31 ¶ 226 (“The Applicants . . . are required to provide sufficient supporting evidence to permit us to verify the likelihood and magnitude of each claimed benefit. Benefits expected to occur only in the distant future are inherently more speculative than more immediate benefits.”); *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3330-31 ¶ 141.

¹¹⁷ See *Comcast-NBCU Order*, 26 FCC Rcd. at 4331 ¶ 226; *Applications of Western Wireless Corp. and ALLTEL Corp. for Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order*, 20 FCC Rcd. 13053, 13100 ¶ 132 (2005).

¹¹⁸ See *Comcast-NBCU Order*, 26 FCC Rcd. at 4331 ¶ 227; *AT&T-T-Mobile Order*, 26 FCC Rcd. at 16248 ¶ 127 & n.362 (“Courts generally have found proof of efficiencies to be inadequate to rebut a finding of likely competitive harm.”); see also *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3331 ¶ 141; *SBC-Ameritech Order*, 14 FCC Rcd. at 14825 ¶ 256.

¹¹⁹ See 47 U.S.C. § 309(e); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (citing 47 U.S.C. § 309(a)) (“[W]hether or not an evidentiary hearing is held, the Commission must make the ultimate determination of whether the facts establish that the ‘public interest, convenience, and necessity will be served by the granting [of the application].’”).

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multiple avenues for expression, the importance of broadband access for all parts of society, all of these can be important.”¹²⁰

B. The Applicants Have Not Provided Evidence Sufficient to Conclude that Any of the Transaction’s Purported Benefits Will Serve the Public Interest

1. The Investment and Buildout Benefits Are Not Transaction Specific

Charter cannot plausibly claim that investment and buildout improvements are a benefit of this transaction, because they would likely have occurred absent the transaction. But that is precisely what Charter has attempted to do. For every milestone and associated commitments that Charter has set forth, there is substantial evidence, even at this early stage in the pleading cycle, that most—if not all—of the claimed investment and buildout was already planned and will likely occur with or without the transaction. This is likely true for the 12 months post-closing milestone, for which Charter has promised to offer a baseline 60 Mbps service to New Charter’s digital subscribers,¹²¹ and likely true for the 30 month post-closing milestone, about which Charter has made the unremarkable claim that it will “transition Time Warner Cable and Bright House Networks’ cable systems to all-digital networks.”¹²² And it is likely true again for the four-year milestone, about which Charter has claimed that it will “invest at least \$2.5 billion in the build-out of networks into commercial areas within our footprint,” “build-out one million line extensions of our networks to homes in our franchise areas,” and “deploy[] over 300,000 out-of-home WiFi access points.”¹²³

¹²⁰ Sallet Remarks at 2.

¹²¹ Charter-TWC Application at 19.

¹²² *Id.*

¹²³ *Id.* at 18.

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60 Mbps Broadband. Within a year of the transaction's close, Charter offers to bring "base speed tiers [in the digital footprint] from 15 Mbps to Charter's current standard minimum of 60 or 100 Mbps."¹²⁴ But this is an easy offer to make. Both TWC and BHN already offer speeds in excess of 60 Mbps in their digital footprint,¹²⁵ and while it is true that both TWC and BHN also offer lower speed tiers, each could do exactly as Charter proposes without this merger. The FCC must require TWC and BHN to submit documents regarding their current and future upgrade plans, absent this merger, to determine whether this upgrade is indeed a transaction-specific benefit. In addition, these touted speed upgrades must be measured in light of the Applicants' other combined offerings. For example, at what price will New Charter offer the 60 Mbps speed? Will consumers be able to select alternative high-speed broadband offerings, for example lower-priced packages with 25 or 50 Mbps speeds? The Applicants have left these questions unanswered, and the Commission should issue document requests to the Applicants to fully understand whether these benefits can indeed be categorized as transaction-specific and/or benefiting the public interest.

¹²⁴ *Id.* at 21.

¹²⁵ See *Shop: Internet*, BRIGHT HOUSE NETWORKS, <http://brighthouse.com/shop/internet/internet.html> (last visited Oct. 10, 2015) (advertising download speeds of up to 150 Mbps); Press Release, Time Warner Cable Bringing Incredibly Fast Internet Plans Across Its Entire Austin Service Area, TIME WARNER CABLE (Feb. 20, 2014), <https://www.timewarnercable.com/content/twc/en/about-us/press/twc-bringing-incredibly-fast-internet-to-austin.html> (announcing that certain customers will receive up to 300 Mbps speeds); Press Release, Time Warner Cable Increases Internet Speeds in First Phase of TWC MAXX Launch in Dallas, TIME WARNER CABLE (June 11, 2015), <http://www.timewarnercable.com/en/about-us/press/twc-increases-internet-speeds-dallas.html> (announcing that certain customers will receive up to 300 Mbps speeds).

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All Digital. Both TWC and BHN have been working steadily to transition to all-digital systems. TWC is on track to transition at least half its subscriber base by the end of 2015,¹²⁶ and has plans to transition another 25 percent of its subscriber base in 2016.¹²⁷ This means that, for each of the last three years, TWC has met or exceeded its digital goal of transitioning a fourth of its subscriber base. And, although Charter claims that TWC lacks “concrete plans” to transition the remaining 25 percent of its subscriber base, the trend is clear, and there is every indication that the company will complete its transition by the end of 2017, *ahead* of the 30-month schedule proposed by Charter. For its part, BHN is already all-digital in central Florida and Tampa, its largest markets. Tellingly, Charter does not convey how many subscribers these markets account for nor what BHN’s future digital plans have been. If these markets are half of BHN’s subscriber base, then that leaves Charter’s maximum contribution to the digital transition at only one million subscribers, and even this number is suspect, as Charter can hardly expect the Commission to believe that BHN lacks *any* plan for digital services across its remaining footprint over the next three years. In sum, this transaction is not a “supercharge” for high-speed broadband as Charter claims.¹²⁸

Commercial & Residential Buildout. Although Charter has told the Commission that it will invest \$2.5 billion in buildout to commercial areas and extend residential networks by one million line extensions within its footprint over the next four years, Charter has failed to link these buildouts to the transaction. We know that TWC, at least, has placed considerable

¹²⁶ Roxanne Romero-Agredano, *A Progress Report on the All-Digital Conversion*, TIME WARNER CABLE (June 12, 2015), <http://www.twcableuntangled.com/2015/06/a-progress-report-on-the-all-digital-conversion/>.

¹²⁷ Comcast-TWC Application at 70.

¹²⁸ Charter-TWC Application at 21.

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emphasis over the last few years on growing its enterprise services.¹²⁹ And network in-fill within existing footprints is low-hanging fruit for cable operators. As for those 300,000 WiFi hotspots, Charter again fails to connect these deployments to the merger. TWC alone already has more than 100,000 hotspots deployed as a result of an aggressive deployment strategy, and the company is part of a consortium that today has more than 400,000 hotspots installed, collectively.¹³⁰ There is every sign that this aggressive deployment will continue.¹³¹ Curiously, Charter does not mention TWC's and BHN's future as members of the cable WiFi consortium. Charter itself is not a member.

2. The Diversity and Public Services Commitments Are Not Transaction Specific

Charter also promises to expand TWC's best practices in diversity and inclusion, and to extend BHN's broadband program for low-income households across New Charter's footprint. Both Charter and BHN remain free and able to incorporate better diversity and inclusion programs without the transaction. The same goes for BHN's broadband program for low-income households. There is nothing stopping Charter and TWC today from implementing similar programs. In fact, TWC already offers a well-publicized "Everyday Low Price" 2/1 Mbps access

¹²⁹ See Frefis Team, *TWC Q2 Preview: High Speed Internet Segment Should Lead Growth as Pay-TV Subscriber Attrition Slows*, FORBES (July 28, 2015), <http://www.forbes.com/sites/greatspeculations/2015/07/28/twc-q2-preview-high-speed-internet-segment-should-lead-growth-as-pay-tv-subscriber-attrition-slows/> ("In the recent past, the company has seen rapid growth in its business services segment with revenue growth of approximately 23% for the year 2014.").

¹³⁰ Press Release, Time Warner Cable WiFi Network Grows to More Than 100K TWC WiFi® Hotspots, TIME WARNER CABLE (June 4, 2015), <http://www.timewarnercable.com/en/about-us/press/twc-wifi-network-grows-to-more-than-100k.html>.

¹³¹ See Press Release, Wi-Fi Alliance® "Fifteen for 2015" Predictions, THE BEACON (Jan. 13, 2015), <http://www.wi-fi.org/beacon/wi-fi-alliance/wi-fi-alliance-fifteen-for-2015-predictions>.

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service for just \$14.99 a month to any and all would-be subscribers.¹³² In contrast, the touted program that BHN is said to offer (2 Mbps down and 512 kbps up) is reported to be difficult to learn of (indeed, it lacks any mention on Bright House's Web site),¹³³ and even more difficult to subscribe to.¹³⁴ It appears to be both highly restrictive in eligibility and available only during select enrollment periods.¹³⁵

3. The Remaining Benefits Are Not Verifiable

In addition to promising to do what the respective merger Applicants were planning to do anyway, Charter also dangles a seemingly enviable trifecta of promised efficiencies, innovation, and American jobs. But most of Charter's efficiency claims are vague assertions without the necessary detail to give them credible form and substance.¹³⁶ First of all, sheer size alone does not produce efficiencies, contrary to the inference from the Applicants' statements.¹³⁷ The combination of two collections of cable plants and other fixed assets and two subscriber bases does not result in a lower cost per subscriber by itself. Merely stating that something is true or

¹³² *High-Speed Internet Plans and Packages*, TIME WARNER CABLE, <http://www.timewarnercable.com/en/plans-packages/internet/internet-service-plans.html> (last visited Oct. 10, 2015).

¹³³ A search of BHN's site on September 30, 2015 failed to reveal any reference to a program for low-income subscribers.

¹³⁴ Phillip Dampier, *Bright House's Mysterious Internet Discount Program Charter Wants to Adopt Nationwide*, Stop the Cap! (June 25, 2015), <http://stopthecap.com/2015/06/25/bright-houses-mysterious-internet-discount-program-charter-wants-to-adopt-nationwide/>.

¹³⁵ *Id.*

¹³⁶ See *Comcast-NBCU Order*, 26 FCC Rcd. at 4330-31 ¶ 226 ("The Applicants, who possess much of the information relating to the potential benefit of a transaction, are required to provide sufficient supporting evidence to permit us to verify the likelihood and magnitude of each claimed benefit.").

¹³⁷ See Charter-TWC Application at 28 ("New Charter's increased scale will enable us more effectively to make significant fixed-cost investments by spreading those investments over a larger customer base.").

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will come to pass does not make it so. Yes, this transaction will “knit together” adjacent or near-adjacent footprints in many regions. But it does not directly follow that this tailoring “drives efficiencies” as Charter claims. Why does it drive efficiency? Charter leaves that question unanswered. Even if there were efficiencies achieved, Charter would have to show that these efficiencies both benefit consumers and are not offset by the substantial harms of the merger. Charter does not even acknowledge the adverse effect this merger will have on consumers’ ability to benchmark their cable service against that offered in neighboring towns. The Commission has recognized that a loss of benchmarking capability is a real and cognizable adverse impact from cable mergers.¹³⁸

Like its claims to efficiencies, Charter’s promise of benefits to innovation are suspect at best. Yes, New Charter itself may have larger resources than Charter standing alone had to devote to “innovation.” But contrary to Charter’s contention, taking three innovators out of the market and merging them into one does not necessarily portend well for innovation in the industry as a whole.¹³⁹ Whereas today we have three companies trying three different approaches, and the market learning from each approach, after the merger the market loses out on two potential alternatives. In any event, Charter has failed to provide the Commission with sufficient detail on the alleged benefit to innovation for this “benefit” to provide any weight on the “pro-merger” side of the scale. This detail is especially important, given that it is well-

¹³⁸ See, e.g., *Adelphia Order*, 21 FCC Rcd. at 8243 ¶ 83 (“We believe that not only regulators, but also consumers, can benefit from the ability to observe how different cable operators are serving proximate areas.”); *id.* at 21 FCC Rcd. at 8243 n. 290.

¹³⁹ See Charter-TWC Application at 32-33 (citing to one deal and one product as an improvement over three deals and three products).

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documented by antitrust experts that efforts to merge “often do not lead to the promised market investments but instead simply result in higher prices and less innovation for consumers.”¹⁴⁰

Charter’s claims about producing American jobs also are in tension with its claims of cost savings. On the one hand, Charter promises to “create thousands of U.S.-based jobs by hiring for customer services call centers and field technicians operations . . . and returning Time Warner Cable call center jobs to the U.S.”¹⁴¹ On the other hand, Charter claims to generate cost savings from efficiencies and savings to “OpEx.” But this hiring spree would seem to increase the costs of New Charter, not decrease them. At minimum, it seems that any call center or field technician gains will be offset by job losses in other parts of New Charter, as Charter admits that it will achieve efficiencies through “less overhead and management structure”¹⁴² amongst the combined companies.

C. The Applicants Have Left Critical Questions Unanswered

In short, Charter’s exposition on the “benefits” that are supposed to inure to the public is badly deficient:

- Charter fails to demonstrate that TWC and BHN would not have upgraded systems to 60 Mbps in their footprints absent the merger. In addition, Charter leaves critical questions about New Charter’s service offerings unanswered, including the price point of this 60 Mbps option, and whether consumers will be able to choose amongst alternative high-speed broadband packages (for example 25 to 50 Mbps plans) at lower prices.
- Charter fails to distinguish between TWC’s and BHN’s pre-merger digital transition plans and Charter’s promised transition.

¹⁴⁰ Baer Remarks at 4.

¹⁴¹ Charter-TWC Application at 20, 41.

¹⁴² *Id.* at 31; Letter from Samuel L. Feder, Counsel for Charter Communications, Inc., to Marlene H. Dortch, FCC, MB Docket No. 15-149, at 2 (July 15, 2015).

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- Charter fails to distinguish between each company's stand-alone infrastructure investment plans and Charter's proposed network investments.
- Charter fails to explain why going it alone in WiFi deployments is a better alternative than TWC's and BHN's existing membership in the WiFi consortium.
- Charter fails to explain how promising to do some of what the companies are already obliged to do under the open Internet rules is a benefit to the public.
- Charter fails to explain why the proposed diversity and public service commitments could not be undertaken by each company, or indeed how BHN's obscure broadband plan for low-income consumers is better than TWC's more easily accessed alternative.
- Charter fails to provide any details or quantitative breakdown for the merger's alleged efficiency gains.
- Charter fails to provide specifics on how the merger will enhance innovation, and how this supposed innovation will inure to the public's benefit.
- Charter fails to detail the job losses expected from "lower overhead and management structure" and how these losses stack up against the call center and field technician jobs Charter alleges it will create.

The Commission should require Charter to remedy these deficiencies and supplement its Application. The submission of relevant documents is particularly important to enable the Commission—and outside parties—to verify the claims made by the Applicants. During the Comcast/TWC merger proceeding, for example, the applicants had made certain allegations that turned out to be completely inaccurate or at least highly questionable upon review of the relevant documents.¹⁴³ Similarly here, the Commission and interested parties cannot simply rely on the

¹⁴³ See e.g., DISH Network Corp., Reply to Opposition, MB Docket No. 14-57, at 7-8 (Dec. 22, 2014) ("DISH Reply in Comcast-TWC") (providing evidence that Comcast's *real*, voluntary churn rate indicates that subscribers rarely leave Comcast even when their service is degraded, despite the applicants' claims that subscribers can and do leave at will based on Comcast's overall churn rate); *id.* at 22, 56-57 (reviewing the discrepancies between Comcast's advocacy to the Commission that 4 Mbps connections are sufficient for HD video, while advertising to consumers a minimum of 25 Mbps); Letter from Pantelis Michalopoulos, Counsel for DISH Network Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Jan. 27, 2015) (providing

words of the Applicants, but must have access to the underlying documents and facts to fully analyze the implications of this merger.

VI. THE APPLICANTS HAVE MISIDENTIFIED THE RELEVANT MARKET

A. Charter, TWC, and BHN Operate in the National Market for Distribution of OTT Services

The Applicants contend that, “[b]ecause Charter, Time Warner Cable, and Bright House Networks serve distinct geographic areas, a combination of the companies does not reduce competition” in “MVPD, broadband or voice services.”¹⁴⁴ As mentioned above, this statement is nearly identical to Comcast’s assertions in its failed application:

- “[T]he transaction presents no ‘horizontal’ competitive concerns because . . . Comcast’s and TWC’s service areas are distinct and the companies do not compete in any relevant market.”¹⁴⁵

evidence that Comcast has an incentive to foreclose OVDs and that almost no one appears to leave Comcast today, despite its claims otherwise); Letter from Pantelis Michalopoulos, Counsel for DISH Network Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Feb. 10, 2015) (providing evidence contrary to the applicants’ claims that “Comcast and TWC have never had plans to expand into each other’s territory” and that Comcast does not have an incentive to foreclose OVDs); Letter from Pantelis Michalopoulos, Counsel for DISH Network Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Feb. 23, 2015) (providing evidence that Comcast was prepared to sacrifice customer experience to increase profits and had a keen interest in engaging in “self-supply” of OTT, harming OTT rivals, and evading merger conditions, despite the applicants’ contrary posture before the Commission); Letter from Pantelis Michalopoulos, Counsel for DISH Network Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Mar. 27, 2015) (providing evidence contrary to Comcast’s claims that the merged company would complete upgrades to TWC’s systems faster than TWC on its own); Letter from Pantelis Michalopoulos, Counsel for DISH Network Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57 (Apr. 13, 2015) (providing evidence that Comcast likely violated *Comcast-NBCU* conditions, despite the applicants’ claims that Comcast has no incentive or ability to harm OVDs, has not harmed OVDs, and the *Comcast-NBCU* conditions are enough to constrain any harmful behavior).

¹⁴⁴ Charter-TWC Application at 42 (Public Interest Statement concerning the Merger of Charter, Bright House, and Time Warner Cable, Fiona Scott Morton, MB Docket No. 15-149 ¶ 5 (June 24, 2015) (“Morton Declaration”) (attached as Exhibit D to Charter-TWC Application).

¹⁴⁵ Comcast-TWC Application at 127.

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- “After the transaction, customers in the Comcast and TWC markets will have as many providers to choose from—for Internet, video, or voice—as they have today.”¹⁴⁶

As Nancy Rose, Chief Economist of the DOJ Antitrust Division, recently stated regarding Comcast’s theory of “no overlap, no problem”: “The fallacy is thinking about the end user customer and not seeing what the market is. . . . We [at DOJ] thought about there being two natural markets for content distribution. One through traditional MVPD video . . . and the other being broadband distribution.”¹⁴⁷

The Commission similarly found the argument lacking. General Counsel Jonathan Sallet recently explained why the lack of geographic overlap is “*not* outcome determinative”:

First, we concluded that the following was *not* outcome-determinative: that there was minimal horizontal overlap between the Applicants in the local markets for residential broadband and Pay TV services. This is important. At the outset of the merger review, some commenters said there could be no competitive issue given the lack of horizontal competition in those markets. But we concluded that assessment of the net impact of the proposed transaction required a wider aperture.¹⁴⁸

This “wider aperture” is due to the participation of Comcast and TWC in national markets (as is the case with Charter and TWC here). As Mr. Sallet indicated:

[The FCC] needed to take into account the fact that both firms participated in national distribution markets, one for broadband distribution and another for Pay TV distribution. While the merging parties did not compete directly in the distribution of programming to consumers in local markets, OVDs do seek to distribute programming throughout the U.S., and negotiate for nationwide distribution rights. The ability of the larger merged firm to limit OVD distribution of programming nationwide, for example by negotiating contractual

¹⁴⁶ *Id.* at 4.

¹⁴⁷ Audio tape: Nancy Rose, Deputy AAG for Economic Analysis, Speaking on Bargaining Leverage and Competitive Effects, sponsored by the A.B.A. Section of Antitrust Law, at 25:50-26:25 (June 25, 2015), http://www.americanbar.org/tools/digitalassetabstract.html/content/dam/aba/multimedia/antitrust_law/20150625_at150625_mo.mp3 (membership required).

¹⁴⁸ Sallet Remarks at 12 (emphasis in original).

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provisions that inhibited an OVD's ability to obtain nationwide online distribution rights, was carefully examined.¹⁴⁹

These conclusions follow a consistent line of precedent from the video industry and other markets that make it clear that transactions must be viewed from a national prism when a transaction has competitive effects on a national market.¹⁵⁰

These conclusions also align with common experience for edge providers. Today, edge providers—such as OVDs—enter the market with national distribution in mind. In addition to established edge providers such as Netflix, Amazon, Google, and Apple, there are a number of nascent edge providers such as Sling TV, Vimeo, Veoh, and Twitch.tv that have entered the market and are trying to secure a toehold in the video marketplace. All of these edge providers—whether established providers or fledgling entrants—require national, or at least near-national, access at sufficient speeds to compete with incumbent competing services and invest in new and innovative offerings.

While Charter and TWC may operate their cable systems in different areas, their offerings are substitutes for one another in an OVD's attempt to assemble a mix of broadband ISPs sufficient to reach a critical mass of high-speed broadband subscribers. As Mr. Lynch explains, it is this complement of ISPs that matters.¹⁵¹ Today, even without uncompromised access to Charter's system, an OVD would likely cobble together a sufficient number of other

¹⁴⁹ *Id.*

¹⁵⁰ See DISH Network Corp., Petition to Deny, MB Docket No. 14-57, at 42-50 (Aug. 25, 2014) (“DISH Petition to Deny Comcast-TWC”) (citing *MediaOne Group, Inc. and AT&T Corp., Memorandum Opinion and Order*, 15 FCC Rcd. 9816 (2000); Complaint, *United States v. Primestar, Inc.*, 1:98-cv-01193 (May 12, 1998); Complaint, *In the Matter of Omnicare, Inc.*, FTC Docket No. 9352 (Jan. 27, 2012); *Thomsen v. Cayser*, 243 U.S. 66 (1917)).

¹⁵¹ Lynch Declaration ¶ 18.

broadband access systems to reach critical mass. After the merger, the option of including either Charter or TWC in the mix will disappear.

B. The Applicants Broadly Construe the Product Market to Avoid the Critical Consumer Harms Implicated by Their Proposed Merger

Repeating the mistakes made by Comcast/TWC, the Applicants offer an artificially broad definition of the product market to include all broadband offerings starting with 1.5 Mbps.¹⁵² This attempt collides head-on with the Commission's recent adoption of 25 Mbps as the threshold speed for advanced telecommunications capability under Section 706 of the Telecommunications Act.¹⁵³ The Commission adopted this threshold for good reason. Lumping broadband offerings starting at 1.5 Mbps in the same market dramatically overstates OVD customers' options.

Customers increasingly expect OVDs to provide long-form, high-definition services—such as true 1080p and 4K content. Indeed, OVDs are the primary way in which most Americans are able to experience 4K content. Picture quality is critical to OVDs seeking to win over consumers—particularly from incumbent MVPDs. But these services are extremely high-bandwidth. The Applicants cite statements by Netflix, Hulu, and Amazon to the effect that speeds between 1.5 and 5 Mbps are enough for consumers to enjoy OVD services.¹⁵⁴ But 1.5 Mbps is barely enough for substandard 420p standard-definition viewing. And while a speed of

¹⁵² Charter-TWC Application at 44.

¹⁵³ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Deployment Act, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, 30 FCC Rcd. 1375, 1377, 1403-08 ¶¶ 3, 45-55 (2015).

¹⁵⁴ Charter-TWC Application at 44.

3 to 5 Mbps may be sufficient for one person to hog all of her household's capacity in order to stream content for an entry-level 720p high-definition show, bandwidth requirements escalate quickly up to 25 Mbps for 4K content.¹⁵⁵ Moreover, when one assumes that multiple users in a given household are likely to access this content or to be conducting other ordinary business over the Internet at the same time, a household's bandwidth needs can easily balloon.

The Applicants themselves recognize the need for speeds at or above 25 Mbps for online video. Charter does *not* even advertise a broadband offering below 60 Mbps.¹⁵⁶ For its part, TWC has declared 50 Mbps as the lowest speed “ideal for downloading music, streaming videos, and more.”¹⁵⁷

VII. EACH APPLICANT HAS, AND THE COMBINED COMPANY WILL HAVE ON A LARGER SCALE, THE INCENTIVE TO FORECLOSE RIVAL OTT VIDEO SERVICES

A. Charter and TWC Already View OVDs as Competitors

Not only do the Applicants possess the ability to do harm, but they are highly motivated to put this ability to action. Charter and TWC already clearly view OVDs as competitors for their video services. After all, DOJ and the Commission have found that broadband providers have a natural incentive to protect their own affiliated video distribution services.¹⁵⁸ Indeed, the

¹⁵⁵ *Internet Connection Speed Recommendations*, NETFLIX, <https://help.netflix.com/en/node/306> (last visited Oct. 10, 2015).

¹⁵⁶ *See Spectrum Internet*, CHARTER, <https://www.charter.com/browse/content/internet> (last visited Oct. 10, 2015) (“Fastest Internet speeds available starting at 60 Mbps.”).

¹⁵⁷ *High Speed Internet Plans and Packages*, TIME WARNER CABLE, <http://www.timewarnercable.com/en/plans-packages/internet/internet-service-plans.html> (last visited Sept. 30, 2015); *see also* David Lazarus, *FCC Seeks Broadband Speeds with Wow Factor; Telecom Firms Say, ‘Whoa’*, LOS ANGELES TIMES (Jan. 29, 2015), <http://www.latimes.com/business/la-fi-lazarus-20150130-column.html>.

¹⁵⁸ For example, the Commission has noted that, “[b]y interfering with the transmission of third parties’ Internet-based services or raising the cost of online delivery for particular edge

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Assistant Attorney General for the Antitrust Division, Bill Baer, recently explained that “as online video distribution increases the cable companies have both the incentives and means to use their gatekeeper power to slow innovation to protect their video profits. In this way, the high-speed Internet market and the video distribution market are inextricably intertwined.”¹⁵⁹

There are many particular reasons to believe that Charter and TWC view OVDs as a threat. For example, Charter is reportedly planning to launch its own OVD in the near future that would compete directly with OVDs like Sling TV. Both Applicants indicated that they view OVDs as competitors for consumer attention and entertainment dollars in the Comcast/TWC proceeding. In the joint application filed by Comcast and TWC, the companies stated that MVPDs face “additional competition” from “established OVDs” and “emerging over-the-top multichannel linear service providers.”¹⁶⁰ Later, in their reply, Comcast and TWC pointed to the “enormous success of online video distributors” as central “competitive dynamics” driving TWC to merge with Comcast.¹⁶¹ Similarly, Charter’s reply in that proceeding stated that “newer

providers, telephone and cable companies can make those services less attractive to subscribers in comparison to their own offerings.” *Preserving the Open Internet, Report and Order*, 25 FCC Rcd. 17905, 17918 ¶ 22 (2010) (“*2010 Open Internet Order*”). Similarly, the DOJ has observed that “an inherent conflict exists between Comcast’s provision of broadband services to its customers, who may use this service to view video programming provided by OVDs, and its desire to continue to sell them MVPD services.” Competitive Impact Statement, *United States v. Comcast Corp., General Electric Co., NBC Universal, Inc.*, 1:11-cv- 00106, at 11 (D.D.C. Jan. 18, 2011).

¹⁵⁹ Baer Remarks at 3.

¹⁶⁰ Comcast-TWC Application at 131, 140.

¹⁶¹ Comcast Corp. and Time Warner Cable Inc., Reply to Responses, MB Docket No. 14-57, at 2 (Dec. 23, 2014) (“Comcast-TWC Reply”).

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sources of competition—including Netflix, Hulu, Amazon, and Apple TV—are exerting competitive pressure on more traditional MVPD providers.”¹⁶²

In fact, if further proof of the Applicants’ motives is necessary, at least one of the Applicants has acted on them already. As mentioned above, from July 2013 through July 2014, TWC used its interconnection policies to significantly degrade its own consumers’ access to Netflix content—even though TWC’s customers had already paid it for access to that content. TWC only stopped once Netflix agreed to pay it a terminating access fee.¹⁶³

B. New Charter Would Have an Increased Incentive to Harm OVDs

In terms of bare broadband numbers, New Charter will be massive in comparison to its current parts, increasing TWC by 58 percent, Charter itself by 282 percent, and BHN by 842 percent.¹⁶⁴ While Charter attempts to trade on its seemingly good network practices as a medium-sized ISP to date, its incentive to do harm will increase dramatically with the merger for a number of reasons.

First of all, the merger will give a boost to New Charter’s own ambitions to become an OVD, and thus make other OVDs a double threat—not only for New Charter’s linear video distribution, but for its OVD business, too. This is not a secret. A key Charter investor, John Malone, has actively advocated for further cable consolidation in order to “compete against . . . Netflix.”¹⁶⁵ Recent news reports have also suggested that the combined entity is exploring

¹⁶² Charter Communications, Inc., Reply to Comments and Opposition to Petitions to Deny, MB Docket No. 14-57, at 7 n.18 (Dec. 23, 2014).

¹⁶³ See *supra* Section IV.C. & n.104.

¹⁶⁴ Morton Declaration ¶ 7, Table 1.

¹⁶⁵ Andy Vuong, *Why John Malone is Pushing Mega Merger Between Charter and Time Warner Cable*, THE DENVER POST (Jan. 14, 2014), <http://blogs.denverpost.com/tech/2014/01/14/why-john-malone-is-pushing-mega-cable-merger-between-charter-and-time-warner/12745/>.

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“establishing the cable industry’s first competitor to services like Netflix Inc. and Hulu.”¹⁶⁶ Such a move would necessarily make the combined entity a direct competitor of OVDs, with every incentive to foreclose its rivals’ access to its broadband subscribers. That view is in line with news reports that the prospect of competition between new OVDs created by programmers like HBO and MVPDs like DISH Network is threatening cable profits and thus “helping drive consolidation” by cable operators seeking ways to combat this new competition.¹⁶⁷

The expansion of New Charter into OVD services would also dramatically change the calculus for determining whether foreclosure would be profitable for New Charter. New Charter would enjoy both the expanded footprint of its MVPD services and a nationwide footprint through its new OTT service. This would allow New Charter to gain video subscribers not only in its own footprint, but also those outside of it. That increased video footprint significantly increases New Charter’s incentive to foreclose a competing OVD.

Third, New Charter would be more highly motivated because it would be able to inflict far greater damage on an OVD such as Sling TV than it can today. Indeed, parallel action by both of the two largest ISP providers in the nation (Comcast and New Charter) would assure the destruction of an OVD such as Sling TV much faster and more definitely than parallel action by the two largest providers today. Mr. Lynch explains that such action by Comcast and New

¹⁶⁶ Malathi Nayak, *Charter-Time Warner Cable Deal Could Spawn an Online Video Service*, REUTERS (May 27, 2015), <http://www.reuters.com/article/2015/05/27/us-twc-m-a-webtv-idUSKBN0OC2Y920150527>.

¹⁶⁷ Alex Sherman, *Why the Cable Companies You Hate May Be Forced to Compete Online*, BLOOMBERG BUSINESS (Apr. 1, 2015), <http://www.bloomberg.com/news/articles/2015-04-01/why-the-cable-companies-you-hate-may-be-forced-to-compete-online>.

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Charter would force Sling TV into a loss that is much steeper than the loss from parallel action by Comcast and TWC today.¹⁶⁸

Even Charter appears to understand that its incentives will change. Rather than proposing to abide indefinitely by the Commission's open Internet rules and some of the good practices it has developed thus far, Charter will only commit to continuing these practices for three short years.¹⁶⁹ Charter's incentives to abuse its newfound market power are unlikely to dissipate during that timeframe—leaving consumers and OVDs particularly vulnerable.

C. New Charter's High Margins from Broadband Would Not Deter It from Harming OVDs

The Applicants try to cast video services as a secondary preoccupation. Broadband is instead put forward as the chief but fragile benefit of the proposed transaction for New Charter—easily susceptible to churn from dissatisfied consumers. On that basis, the Applicants assure the Commission that they have the interests of third-party OVDs at heart and that no harm will come to them.

The Commission has heard this theory before—in the Comcast/TWC transaction. But it is no more valid today than it was then. First, it depends critically upon consumers' ability to switch providers freely. But consumers find it immensely difficult to switch and are unlikely to do so, even in the face of clear interference with their choice of OVDs. The Applicants fail to provide any meaningful evidence to the contrary. Second, the Applicants suggest that video services are not really worth protecting. But video services are valuable, and this transaction would make them more valuable for New Charter than they are today for any Applicant.

¹⁶⁸ Lynch Declaration ¶ 20.

¹⁶⁹ Charter-TWC Application at 18-19, 23.

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1. Consumers Are Unlikely or Unable to Churn Away from New Charter

The Applicants' premise that foreclosure of OVDs would cause New Charter to suffer from extensive migration of its broadband customers is implausible for anyone who has recently attempted to switch ISPs. As the Commission has repeatedly found, switching providers is difficult and time consuming.¹⁷⁰ In addition, approximately two thirds of New Charter's subscribers will not even have an alternative high-speed broadband option available to them, making switching for these customers impossible.¹⁷¹

The Applicants' premise also implies that consumers would take such an arduous path even though switching or terminating OVDs only requires a few clicks—and even in the face of assurances by their ISP that their chosen OVD, and not their broadband service, is the source of the trouble. Consumers facing that uncertainty are even more likely to switch OVDs rather than their ISP given that they can get much of the same content through a variety of different OVDs, and often can try the alternative OVD through a free trial.

Unsurprisingly, then, the Applicants provide little meaningful evidence in defense of this premise. The Applicants provide the Commission with Charter's aggregate annual churn rate of {{BEGIN HCI END HCI}}.¹⁷² That figure, low itself, is likely over-inclusive. It

¹⁷⁰ See, e.g., *2010 Open Internet Order*, 25 FCC Rcd. at 17924-25 ¶ 34 (“[C]ustomers may incur significant costs in switching broadband providers because of early termination fees; the inconvenience of ordering, installation, and set-up, and associated deposits or fees; possible difficulty returning the earlier broadband provider's equipment and the cost of replacing incompatible customer-owned equipment; the risk of temporarily losing service; the risk of problems learning how to use the new service; and the possible loss of a provider-specific email address or website.”); *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, 5629-31 ¶ 80 (2015) (“*Open Internet Order*”).

¹⁷¹ Charter-TWC Application at 60.

¹⁷² Morton Declaration ¶ 55.

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presumably includes both voluntary and involuntary churn. Granular information on Charter's voluntary churn—the kind of churn relevant to proving whether switching is easy—is entirely absent from their Application.

Worse, the Applicants fail to provide any analysis of TWC's churn during its months-long dispute with Netflix. If their theory were correct, the slightest suggestion that TWC had degraded their own subscribers' access to Netflix content would have sent at least some people for the door. After all, if switching were easy, and if competitive options were plentiful, some portion of Netflix's loyal fan base would not have stuck around.

Rather than analyzing their own data, the Applicants once again offer up the faulty Global Strategy Group ("GSG") Survey, on which Comcast and TWC had relied in their merger proceeding. This survey was soundly criticized for its basic methodological errors and its failure to align with common sense and experience. Among other things,

- the survey was not conducted in the ordinary course of business;¹⁷³
- the survey was provided through an online panel provider and thus was not probability-based;¹⁷⁴
- it is unclear whether respondents understood and accurately replied to the questionnaire;¹⁷⁵
- the questions posed by the survey are misleading and leading;¹⁷⁶

¹⁷³ David S. Evans, Economic Analysis of the Impact of the Comcast/Time Warner Cable Transaction on Internet Access to Online Video Distributors: Response to Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57 ¶¶ 240-47 (Dec. 23, 2014) ("Evans Reply Declaration").

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* ¶ 250; DISH Reply in Comcast-TWC at 22-23.

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- the survey overstates actual churn;¹⁷⁷ and
- GSG eventually backed away from the results of its own survey.¹⁷⁸

Moreover, the Applicants' suggestion that consumers would necessarily churn away from New Charter as a result of foreclosure appears to be based on a false dichotomy in which the combined entity must supposedly foreclose its subscribers' access to all OVDs at once or none at all. But as noted above, an ISP has any number of tools at its disposal for surgically foreclosing access to a particular OVD. For example, an ISP can employ deep packet inspection to target and disrupt video streams from specific sources.¹⁷⁹ Or the ISP can simply determine which transit routes into its network an OVD is using, and then apply pressure to the transit provider to stop carrying the OVD's traffic.¹⁸⁰

Neither of these strategies inhibits a consumer's access to multiple OVDs or even a significant portion of the Internet. As a result, it is often difficult, if not impossible, for any given subscriber to understand whether its inability to obtain quality service from an OVD is the fault of the ISP or the OVD. And ISPs are notoriously unwilling to accept any blame for a subscribers' degraded or blocked access to content, even when their network practices are clearly at fault.¹⁸¹

¹⁷⁷ DISH Reply in Comcast-TWC at 25.

¹⁷⁸ Letter from Markham C. Erickson, Counsel for Netflix, Inc., to Marlene H. Dortch, FCC, MB Docket No. 14-57, at 3 n.13 (Apr. 6, 2015).

¹⁷⁹ See DISH Reply in Comcast-TWC at 126.

¹⁸⁰ See Netflix, Inc., Reply, MB Docket No. 14-57, at 8-10 (Dec. 23, 2014).

¹⁸¹ See, e.g., *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp.*, 23 FCC Rcd. 13028, 13030-32 ¶¶ 6-9 (2008); John Ribeiro, *Verizon Threatens to Sue Netflix in War of Words Over Video Quality*, PCWORLD (June 6, 2014), <http://www.pcworld.com/article/2360860/verizon-threatens-to-sue-netflix-in-war-of-words-over-video-quality.html>.

2. The Applicants' Video Business Is Worth Protecting

A low margin business is very different than an unprofitable one. According to the Applicants' most recent 10Ks, TWC made some \$10 billion in revenue from video services in 2014; Charter made some \$4.4 billion in revenue.¹⁸² The proposed merger would allegedly yield cost savings of an estimated { **BEGIN HCI** **END HCI** } for Charter by the third year after the transaction due to merely switching to TWC's programming contracts.¹⁸³ The combined entity's increased bargaining power would likely expand those savings dramatically across all of the Applicants' video services.

Unsurprisingly, then, none of the Applicants has suggested that New Charter would be looking to exit the video business. Just the opposite: Charter has suggested that the merged entity may expand its video services to include a nationwide OTT offering.¹⁸⁴

The combined entity would be the third-largest MVPD, behind only DIRECTV and Comcast—increasing Charter's MVPD share from 4.3 million to 17.3 million subscribers. As the Applicants admit, the increase in subscribership would dramatically increase Charter's bargaining power over programmers—providing the combined entity with significant cost savings and increased video margins compared to Charter's and TWC's margins today.¹⁸⁵ While the Applicants suggest that video is an afterthought for Charter's future, it is likely that this transaction would boost Charter's MVPD services as a cornerstone of its bundled offerings.

¹⁸² Time Warner Cable, Inc., Annual Report, Form 10-K, at 46 (Feb. 13, 2015); Charter Communications, Inc., Annual Report, Form 10-K, at 46 (Feb. 24, 2015).

¹⁸³ Letter from John L. Flynn, Counsel for Charter Commc'ns Inc., to Marlene H. Dortch, FCC, MB Docket No. 15-149, at 2 (July 10, 2015).

¹⁸⁴ Jim O'Neill, *Charter Says Talks Ongoing with Bright House; OTT Offering Possible*, OYALA.COM (May 1, 2015), <http://www.ooyala.com/videomind/blog/charter-says-talks-ongoing-bright-house-ott-offering>.

¹⁸⁵ Morton Declaration ¶ 23.

D. New Charter Would Have a Particularly Strong Incentive to Discriminate Against Sling TV

Sling TV's OTT services are particularly vulnerable to blocking and discrimination on the broadband pipe because they can entirely replace traditional pay-TV services.¹⁸⁶ If Charter or TWC degraded the quality of a Netflix or Amazon subscriber, the customer could, at least, continue watching her cable TV service for linear video, such as sports, news, or broadcast network programming.¹⁸⁷ But, a Sling TV consumer ideally subscribes to a residential broadband service and then turns to the online-only Sling TV service for nearly all of her television-viewing needs. This poses a substantial competitive threat to Charter and TWC and presents a particularly attractive target for New Charter to sabotage.¹⁸⁸

New Charter would therefore have an acute incentive to thwart the quality of Sling TV.¹⁸⁹ This would have a substantial negative impact on the ability of Sling TV to serve its customers and impose competitive pressure on New Charter.¹⁹⁰ New Charter could sufficiently degrade Sling TV's service so that the consumer would be more easily persuaded to drop the Sling TV service in favor of New Charter-provided linear video programming service.¹⁹¹

E. Open Internet Rules and the Applicants' Open Internet Commitments Are Not Enough to Mitigate the Anti-Competitive Effects of the Merger

The Applicants' next line of defense is that foreclosure conduct towards OVDs would be sufficiently restrained by the Commission's open Internet rules, which have been effective since

¹⁸⁶ Lynch Declaration ¶ 21.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* ¶ 22.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

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June 12, 2015, or alternatively, by their own open Internet commitments. Specifically, while the Applicants have joined in challenging the rules in the U.S. Court of Appeals for the D.C. Circuit,¹⁹² they say they will abide by some open Internet protections if the rules are struck down by the court pursuant to that challenge.

To start with, the Applicants' position is odd. On the one hand, they join in challenging the open Internet rules that are in place today. On the other, they assure the Commission there is no need to fear anticompetitive effects because they are fully willing to abide by open Internet protections even if they succeed in invalidating the rules. Why are they staking out these seemingly contradictory positions? The answer is twofold. First, the Applicants' commitment will last only for three years after closing. In reality that may be even less. Suppose that the Applicants receive Commission approval and consummate their deal, and that the D.C. Circuit or the Supreme Court issue a decision invalidating the rules six months or two years after. In that case, the decision would come after the beginning of the three-year commitment period, meaning that the Applicants' commitment would last for two and a half years, or only one year, respectively. At its expiration, New Charter would spring free from any restrictions on its ability and incentive to foreclose OVDs.

Second, New Charter will only commit to observe a subset of open Internet rules carefully carved out of the whole. The Applicants "offer" that New Charter will abide by the three bright-line rules—no blocking, no throttling, and no paid prioritization. As to the no

¹⁹² The Applicants are members of the National Cable & Telecommunications Association ("NCTA"), who is a Petitioner challenging the Commission's open Internet rules before the D.C. Circuit. See Joint Brief for Pet'rs USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and Centurylink, *United States Telecom Ass'n, et al. v. FCC*, No. 15-1063 (July 30, 2015); *Membership: NCTA Member Companies*, NCTA, <https://www.ncta.com/who-we-are/membership> (last visited Oct. 11, 2015).

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unreasonable interference or disadvantage rule, or the general anti-discrimination standard, New Charter will not observe them except in limited ways, related to additional fees, zero rating, data caps, and interconnection. In other words, the Applicants try to reassure the Commission by offering something substantially less than the rules the agency thought necessary for all ISPs, let alone two ISPs seeking to create the second largest ISP in the country. That is obviously insufficient.

But even the open Internet rules in their entirety, while an important achievement by this Commission, would not nearly be enough to remedy this transaction's anticompetitive effects. First of all, if DISH is correct that the merger would significantly increase New Charter's incentive and ability to harm OVDs, conduct restrictions will not work. The idea is tantamount to letting the fox into the henhouse but prohibiting attacks on hens. For that reason, the Commission was right when it cautioned in the *Open Internet Order* that, notwithstanding the new rules, "it will remain essential for the Commission, as well as the Department of Justice, to continue to carefully monitor, review, and . . . take action against any anti-competitive mergers."¹⁹³ As the Commission explained in the *Open Internet Order*:

Of course, this regulatory backstop is not a substitute for robust competition. The Commission's regulatory and enforcement oversight, including over common carriers, is complementary to vigorous antitrust enforcement. Indeed, mobile voice services have long been subject to Title II's just and reasonable standard and both the Commission and the Antitrust Division of the Department of Justice have repeatedly reviewed mergers in the wireless industry. Thus, it will remain essential for the Commission, as well as the Department of Justice, to continue to carefully monitor, review, and where appropriate, take action against any anti-competitive mergers, acquisitions, agreements or conduct, including where broadband Internet access services are concerned.¹⁹⁴

¹⁹³ *Open Internet Order*, 30 FCC Rcd. at 5693 ¶ 203.

¹⁹⁴ *Id.* at 5693 ¶ 444 n.450.

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Equally important, the foreclosure conduct threatened by the transaction would most likely not be subject to the bright-line rules, but rather it would be subject to the no unreasonable interference or advantage standard and the general Title II non-discrimination requirement. New Charter's treatment of OVD traffic at the interconnection point, as well as all manner of discrimination against OVD packets, would all be governed by the general rules. The Applicants would like the public to believe that the net neutrality restrictions have the clarity of "thou shalt not steal," that New Charter will not steal, and that this will remedy all anti-competitive effects stemming from the merger. But it is highly uncertain how these rules will be applied by this Commission and its successors. The Commission's work will not be easy. It would be immensely difficult, if not impossible, for the Commission to detect all methods for New Charter to engineer or argue its way around the open Internet rules.

Even if vindication comes for the complaining OVD or customer and Charter is ordered to stop the offending conduct, it will come after an FCC proceeding, it will be prospective-only relief incapable of undoing already-inflicted competitive damage, and it will not be the end of the matter as it can be subject to stay requests, reconsideration petitions, and appeals.

VIII. THE MERGER WOULD ELIMINATE POTENTIAL COMPETITION BETWEEN CHARTER AND TWC

A. The Proposed Merger Would Undermine Future Competition Among the Applicants in Adjacent Geographic Areas

The Applicants propose this merger as a solution to several problems. But while the problems vary, the proffered solution is the same: increased size. The most natural and straightforward way to grow the size of a network is to build out into new territory. Such expansion is unquestionably the best result for consumers. But this is not what the Applicants propose. Instead, they ask the Commission for permission to forego the pro-competition, pro-consumer route, in favor of consolidation.

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Opportunities for network expansion abound for Charter and TWC. As the Commission previously found, 98 percent of consumers have access to two or fewer choices in high-speed broadband.¹⁹⁵ This less than optimal level of competition for fixed broadband has resulted in historically low customer satisfaction ratings for ISPs—suggesting ample room for additional competitors in most markets.

There are no greater targets for network expansion than Charter’s and TWC’s own territories. The Applicants themselves admit that almost two out of every three consumers within their collective footprints lack a competitive choice for high-speed broadband. And while the Applicants go to great lengths to explain that their networks do not “overlap,” one cannot help noticing how often their networks touch. Take the Applicants’ graphic of the Dallas-Ft. Worth DMA below:¹⁹⁶

¹⁹⁵ Memorandum from William T. Lake, Media Bureau, FCC, to Marlene H. Dortch, Secretary, FCC, at Exhibit 3d, MB Docket No. 14-57 (Dec. 9, 2014).

¹⁹⁶ Charter-TWC Application at 34.

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For example, the Dallas-Ft. Worth DMA has been partitioned by Charter and TWC. A line of demarcation runs down the middle of this lucrative market, with Charter also holding various enclaves within TWC's territory. The Applicants suggest that similar situations exist among their networks in New York, Los Angeles, Boston (Manchester), Houston, Detroit, Denver, Charlotte, and Raleigh-Durham (Fayetteville).¹⁹⁷ In short, the overbuilding threat that

¹⁹⁷ *Id.*

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each Applicant now poses for the other seems much more vivid than in the case of Comcast and TWC, whose systems were generally less clustered together with one another's.

The “touch but don’t overlap” strategy employed by the Applicants is anathema to competitive markets, where expansion is the status quo. A neighboring provider today is a competitor tomorrow. Even amid the dearth of competition in Dallas-Ft. Worth, TWC’s current policy of not overbuilding into the enclaves held by Charter deep within TWC’s territory seems odd. Absent consolidation, it is hard to see such oddities existing forever in the broadband market. After all, the Applicants themselves press the idea that the efficiencies of scale and expanded geography are a powerful reason to spend money today. And given the Applicants’ existing, neighboring facilities, overbuilding into their neighbor would be much easier and a less expensive proposition than entering into a new market.

The Commission has previously discounted the loss of competition from clustering based on the limited extent of overbuilding.¹⁹⁸ But the economic case for overbuilding has changed since the Commission last looked seriously at cable clustering in *Adelphia*.¹⁹⁹ Broadband has become a significant source of revenue and free cash flow, making overbuilding far more attractive. The lure of broadband revenues has already spurred overbuilding by many non-cable operators such as AT&T, Google Fiber, and the Electric Power Board of Chattanooga. There is no reason that it should not spur overbuilding among cable companies neighboring one another as well.

¹⁹⁸ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report*, 12 FCC Rcd. 4258, at 4428 ¶ 139 (1997) (finding “clustering eliminates the operators of adjacent cable systems as potential overbuilders” but “overbuilding has not proved a major means of entry into video programming delivery markets.”).

¹⁹⁹ See *Adelphia Order*, 21 FCC Rcd. at 8243-44 ¶ 84.

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Permitting the Applicants to merge would remove the potential for this natural competition to occur. That would be a loss for consumers, who would likely see significant and immediate benefits from such direct competition. Take Google Fiber's recent announcement that it had selected Austin, Texas as one of its next targets for expansion. Within weeks of that announcement, AT&T announced service improvements aimed at preventing customer defections, and TWC followed suit a few months later.²⁰⁰ TWC announced that it was increasing its broadband speeds by 600 percent; AT&T announced it would increase its already high broadband speeds by over 300 percent by bringing Gigabit service to the area.²⁰¹ TWC also announced programs to bring more free WiFi service to the community.²⁰² All of this resulted from the mere announcement of the potential for a new competitor—long before Google Fiber laid a single strand of fiber.

Charter, TWC, and BHN subscribers would also lose a natural and important opportunity for benchmarking their broadband service. Today, a TWC subscriber in Dallas has at least two

²⁰⁰ See *Google Fiber's Next Stop: Austin, Texas*, GOOGLE FIBER BLOG (Apr. 9, 2013), http://googlefiberblog.blogspot.com/2013/04/google-fibers-next-stop-austin-texas_9.html; Press Release, AT&T Announces Intent to Build 1 Gigabit Fiber Network in Austin, AT&T (Apr. 9, 2013) <http://www.att.com/gen/pressroom?pid=24032&cdvn=news&newsarticleid=36275&mapcode=>; Press Release, AT&T to Deliver the First All Fiber 1 Gigabit Broadband Network to Austin, AT&T (Oct. 1, 2013) (“AT&T Austin Upgrade”), <http://www.att.com/gen/press-room?pid=24841&cdvn=news&newsarticleid=37036&mapcode=>; Press Release, Time Warner Cable Bringing Incredibly Fast Internet Plans Across Its Entire Austin Service Area, TIME WARNER CABLE (Feb. 20, 2014) (“TWC Austin Upgrade”), <https://www.timewarnercable.com/content/twc/en/about-us/press/twc-bringing-incredibly-fast-internet-to-austin.html>.

²⁰¹ See TWC Austin Upgrade (announcing speed increases from 50 to 300 Mbps downstream); AT&T Austin Upgrade (announcing speed increases from 300 Mbps to 1 Gigabit downstream).

²⁰² Press Release, Time Warner Cable to Launch Free Citywide TWC WiFi Network for its Austin, Texas Internet Customers in 2013, TIME WARNER CABLE (Apr. 24, 2013), http://www.timewarnercable.com/en/about-us/press/time_warner_cable_free_citywide_twc_wifi_austin_texas.html.

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benchmarking opportunities: AT&T's services in Dallas, and Charter's services in neighboring Ft. Worth. This transaction will remove one of those. Benchmarking is important for consumers as it allows them to assess the legitimacy of their ISP's actions and policies—from the price they pay for service, to policies that interfere with their ability to receive the content of their choosing. The proposed transaction would free the Applicants from the disciplining force of benchmarking, and may make anti-competitive actions by the combined entity more difficult to detect, prosecute, and deter.²⁰³

B. The Merger Would Eliminate any Potential OTT Competition Between Charter and TWC

The Commission should also consider the competitive harm that New Charter may inflict on the overall video market by eliminating TWC as a potential national OTT video competitor. TWC has a track record of innovating in the OTT space that will be diminished by the merger. TWC has invested in a variety of partnerships supporting consumers to access the company's content through a number of OTT devices.²⁰⁴

IX. THE MERGER WOULD GIVE NEW CHARTER SIGNIFICANT LEVERAGE TO USE TO FORECLOSE ACCESS TO THIRD-PARTY ONLINE RIGHTS AND RAISE OTHER MVPDS' THIRD-PARTY PROGRAMMING COSTS

The merger would also give New Charter significant additional leverage when negotiating online rights with third-party programmers. Notably, the FCC has already recognized the harm that a large merged rival can inflict on an OVD competitor in this arena, noting that the agency carefully examined “the ability of the larger merged firm to limit OVD distribution of programming nationwide, for example by negotiating contractual provisions that

²⁰³ See Declaration of David Sappington Declaration, MB Docket No. 14-57 ¶¶ 70-72 (Aug. 25, 2014) (attached to DISH Petition to Deny Comcast-TWC).

²⁰⁴ DISH Petition to Deny Comcast-TWC at 22-24, 76-80.

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inhibited an OVD's ability to obtain nationwide online distribution rights," with respect to the failed Comcast/TWC merger.²⁰⁵

In particular, New Charter—with its greater scale—would possess even more leverage than the Applicants' companies have now to: (a) acquire the most robust OTT distribution rights from third-party programmers in order to increase the appeal of its own video platform; and (b) restrict the ability of third-party programmers to grant online rights to competing OTT services, like DISH's.

For example, New Charter could employ a number of contractual tools to limit competing OVDs' ability to access programming. These include:

- Requiring competing OVD programming to be distributed through New Charter's cable MVPD service at below-market rates;
- Imposing contractual restrictions on third-party content providers to limit OVD access to content;
- Imposing contractual restrictions that limit the ability of OVDs to gain preferential/equal "windowing" of content;
- Imposing contractual restrictions on third-party content providers to limit OVD access to "must-have" or marquee programming; and
- Imposing contractual channel/bundling restrictions on third-party content providers to require OVDs to carry more channels than they otherwise would be required to.²⁰⁶

In fact, Sling TV has had difficult negotiations with key programmers in its attempt to secure online distribution rights.²⁰⁷ In these negotiations, Sling TV has frequently been informed that certain programmers' agreements with certain cable operators prohibit them from, or restrict them in, granting such rights. The Commission should investigate whether any Applicant has

²⁰⁵ Sallet Remarks at 12.

²⁰⁶ See DISH Reply in Comcast-TWC at 123-26.

²⁰⁷ See Letter from Stephanie A. Roy, Counsel to DISH Network Corp., to Marlene H. Dortch, FCC, MB Docket No. 14-57, at 2 (Jan. 29, 2015).

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sought to exact or has exacted such restrictions from programmers. At a minimum, the Commission should issue the same document requests to MVPDs, third-party programmers, and device manufacturers that it issued in the Comcast/TWC transaction to conduct this analysis.

In addition to encouraging the merged company to withhold the programming that it controls from competitors, the merger may raise the costs of New Charter's competitors in another important way. New Charter will likely be able to extract concessions from large, third-party programmers and those programmers will, in turn, seek to recoup costs from smaller MVPDs.²⁰⁸ There is no doubt that the large programming conglomerates enjoy significant clout in their negotiations with smaller MVPDs.

X. PROPOSED CONDITIONS IF THE COMMISSION DECIDES TO APPROVE THE MERGER

DISH does not believe that any conduct conditions would be sufficient to mitigate, let alone cure, this transaction's substantial anticompetitive effects. But if the Commission disagrees, then it should, at a minimum, impose all the voluntary commitments put forth by Charter,²⁰⁹ for a period of seven years, in addition to conditions that go a bit further. Below, DISH proposes four conditions that could potentially remedy the substantial "transaction-specific harms or ensure transaction-specific, *verifiable*, public interest benefits" necessary to protect the public.²¹⁰ These conditions, if imposed, should be effective for at least seven years, and subject to renewal.

²⁰⁸ See DISH Petition to Deny Comcast-TWC at 83-86.

²⁰⁹ See Charter-TWC Application at 2-5.

²¹⁰ Sallet Remarks at 10 (emphasis in original).

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Condition #1: Preserve and Protect Consumer Choice in Residential Video and Broadband Through Mandatory Wholesale and Unbundling of New Charter's Broadband Product

Any approval of the transaction should require New Charter to unbundle its broadband Internet access services from its video business for the next seven years, including by providing unbundled broadband access at reasonable non-discriminatory wholesale rates to other service providers that seek to offer retail or commercial broadband services—either as part of a bundle of services or on a standalone basis.

This condition strikes at the heart of the main competitive problem arising from the proposed transaction. Without it, New Charter would be secure in the comfort of being the only saloonkeeper in town. It would be free to degrade the broadband access needed by independent OVDs, safe in the knowledge that it will lose few, if any, broadband customers. Coupled with the dramatically heightened incentive produced by the merger to harm OVDs, this impunity will likely spell serious damage for OVDs, especially if reinforced by parallel action on the part of Comcast.

Short of overbuilding, the wholesale unbundling condition is the only effective check on New Charter's behavior. It will ensure that consumers who want to subscribe to an OVD can easily obtain a standalone broadband connection to power that OVD's offerings. It will also reduce New Charter's anticompetitive incentives by giving New Charter's broadband customers at least one other option in their service area.²¹¹

²¹¹ This is effectively the same reasoning given by the Commission in adopting a wholesale condition in the *AOL-Time Warner Cable Order*. See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., to AOL Time Warner Inc., Memorandum Opinion and Order*, 16 FCC Rcd. 6547, 6571 ¶ 61 (2001) (“*AOL-Time Warner Order*”) (“If, in contrast, AOL Time Warner were obligated to carry multiple, unaffiliated ISPs over its network on non-discriminatory terms, those ISPs could serve

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Wholesale broadband conditions have been adopted in previous mergers and have a track record of success. For example, approval for the *AOL/Time Warner* merger was conditioned upon entering a private contractual arrangement under which EarthLink was granted non-discriminatory access to the TWC system to offer a competitive broadband Internet access service to consumers.²¹² By all accounts, the arrangement was a success:

This [wholesale broadband] condition has proven to be a success for everyone involved: Time Warner Cable, EarthLink, consumers and regulators. Time Warner and EarthLink have been fully satisfied with the relationship, as evidenced by the fact that the parties have voluntarily renewed the arrangement after the mandatory five-year condition had expired. Further, as a result of the reasonable terms, prices and conditions made available to EarthLink, Time Warner Cable's customers continue to have access to a competitive Broadband Access Service offering.²¹³

What is more, this type of structural condition enabled the government agencies overseeing the merger to take a more “hands-off” approach rather than referee the post-merger conduct of AOL and Time Warner through complex behavioral conditions.²¹⁴ The Commission thus recognized the need for a wholesale broadband condition as far back as 2001, when the Internet access market was far less concentrated than today. The competitive benefits of such a condition applied in this case would only be more impactful now compared to nearly 15 years ago.

as an alternative outlet for non-AOL Time Warner content, making it more likely that AOL Time Warner's affiliated ISPs would feature such content themselves to remain competitive.”).

²¹² *Id.* at 6590 ¶ 96.

²¹³ EarthLink, Inc., Petition to Condition or Deny, MB Docket No. 10-56, at 50 (June 21, 2010).

²¹⁴ *Id.*

Condition #2: New Charter Shall Refrain from Restricting Third Parties from Granting Online Rights to New Charter Video Competitors

New Charter should be prohibited from entering into or enforcing any contractual provisions with programmers that have the effect of prohibiting or restricting the grant of OTT rights to third-party distributors in any manner, including by the use of most-favored nation (“MFN”) clauses.

As explained above, New Charter will have an immense and heightened incentive to harm OVDs. Its increased scale would also provide the cable company with significant new leverage over third-party programmers, which New Charter could use to pressure programmers into withholding key OTT rights from its rivals or limiting such rights. As mentioned, a number of programmers have informed Sling TV of such restrictions imposed by certain cable operators in the course of Sling TV’s efforts to secure OTT rights. The Commission should determine whether TWC or Charter is one of those operators. OTT rights are critical for parties seeking to provide video services that would compete against New Charter’s services. As the Commission explained in adopting a similar condition in *Comcast/NBCU*, any loss of competition for OVDs necessarily “harms . . . consumer choice, diversity, and broadband investment” and directly conflicts with the public interest.²¹⁵

Condition #3: Preserve and Protect Consumer Choice in Residential Video and Broadband Through a Standalone Offering of New Charter’s Broadband Product and Synthetic Bundles of New Charter Broadband Products and Competing MVPD/OVD Products

The Commission should also require New Charter to decouple its broadband and MVPD services in two ways. First, if New Charter chooses to bundle its video and broadband services, it should be required to make synthetic bundles available to all its subscribers that include both

²¹⁵ See *Comcast-NBCU Order*, 26 FCC Rcd. at 4267 ¶ 73.

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Charter's broadband service and the video service of any requesting MVPD or OVD at reasonable non-discriminatory rates via a direct agency relationship. Second, the Commission should adopt a standalone residential broadband requirement similar to the one it adopted in *Comcast/NBCU*.

As the Commission explained in *Comcast/NBCU*, "this threat would be reduced and future competition in video distribution markets would be protected by ensuring that consumers have the flexibility to choose an MVPD provider that is separate from their broadband provider."²¹⁶ New Charter, like Comcast before it, could "hinder competition from DBS and OVD providers, both of which provide video over a third-party's broadband network, by requiring a cable subscription in order to receive broadband services or by charging an excessive price for standalone broadband services."²¹⁷ Both remedies would work together to help potentially mitigate this threat and ensure that consumers have full and unbridled choice in selecting the video product that is right for them, thereby potentially limiting New Charter's ability to undermine video competition.

The terms of the proposed standalone broadband condition are set forth in detail in Exhibit A.

Condition #4: New Charter's Commitment to Abide by Open Internet Principles Must Be Expanded and Extended to Seven Years

New Charter has committed to not block or degrade content,²¹⁸ to not engage in paid prioritization,²¹⁹ to not impose data caps,²²⁰ to provide settlement-free interconnection,²²¹ and to

²¹⁶ *Id.* at 4279 ¶ 102.

²¹⁷ *Id.*

²¹⁸ Charter-TWC Application at 3.

²¹⁹ *Id.*

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submit interconnection disputes to the Commission—irrespective of the outcome of the pending litigation over the *Open Internet Order*. The Commission should accept these conditions (and extend them to seven years), but Charter should be required to abide by the *Open Internet Order* in its entirety, not only the bright-line rules against blocking, degrading, or prioritizing content that the Applicants have cherry-picked. Without that, New Charter effectively leaves itself free to engineer around the bright-line rules.

XI. CONCLUSION

For the foregoing reasons, the Commission should deny the Application.

Respectfully submitted,

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October 13, 2015

²²⁰ *Id.*

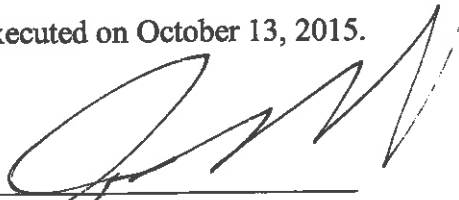
²²¹ See Letter from Samuel L. Feder, Counsel to Charter Commc'ns Inc., to Marlene H. Dortch, FCC, MB Docket No. 15-149 (July 15, 2015).

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DECLARATION

The foregoing has been prepared using facts of which I have personal knowledge or upon information provided to me. I declare under penalty of perjury that the foregoing, except for those facts for which official notice may be taken and those that other parties have submitted to the Federal Communications Commission confidentially under the protection of the *Protective Order* in MB Docket No. 15-149, or otherwise, is true and correct to the best of my information, knowledge and belief.

Executed on October 13, 2015.


A handwritten signature in black ink, appearing to read 'J. Blum', is written over a horizontal line.

Jeffrey H. Blum
Senior Vice President & Deputy General Counsel
DISH Network Corporation

EXHIBIT A:
STANDALONE
BROADBAND CONDITION

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EXHIBIT A

STANDALONE BROADBAND

Definition:

“Broadband Internet Access Service” means a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the Conditions.

1. New Charter shall provide standalone Broadband Internet Access Service at speeds of at least 25 Mbps (download) for any portions of its network where it is technically able to do so at a price no greater than \$29.95 for seven (7) years from the date of this Order (provided that the price can be increased by no more than any increase in the CPI-U for Communications after two years). If the Commission updates its official broadband benchmark speed during the seven-year period then New Charter shall offer at least the new Commission-defined broadband benchmark speed in its standalone offering under the terms and conditions herein, for any portions of its network where it is technically able to do so. This standalone service shall be made available on the most-favorable usage terms and conditions (including but not limited to usage caps) to the 25 Mbps (or new Commission-defined benchmark broadband speed) Broadband Internet Access Service included in any bundled offering.

2. If New Charter offers a 25 Mbps (download) Broadband Internet Access Service as part of a bundled service package, then the price of the bundle shall be reasonable and take into account the costs (including, but not limited to COGS, variable, acquisition, infrastructure, and administrative costs, among others) of providing each of the services included in the bundle (*i.e.*, video, wireless, landline phone, etc.).

3. If New Charter offers any broadband speeds in conjunction with bundled service packages, New Charter shall also offer such speeds pursuant to the following terms and conditions:

- (A) Any broadband speed offered as part of a bundled package must also be made available on a standalone basis. In each case, the standalone offering shall be made available on the most-favorable usage terms and conditions (including but not limited to usage caps) to the most comparable Broadband Internet Access Service offered in a bundled offering.
- (B) The price of such standalone Broadband Internet Access Service offerings shall be reasonable and take into account the cost savings (including, but not limited to COGS, variable, acquisition, infrastructure, and administrative costs, among others) of not having to provide bundled services (*i.e.*, video, wireless, or landline phone).

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4. Starting no later than 30 days after the date of this Order, New Charter shall visibly offer and actively market standalone Broadband Internet Access Service (as described in paragraph 1-3, above) through any sales channel through which it offers bundled services, including but not limited to:
 - (A) Web Page Advertising and Sales: Any time New Charter sells, markets, promotes or offers Broadband Internet Access Service on any of its Web sites, it must display the standalone Broadband Internet Access Service offering with prominence equal to that of bundled offerings, including but not limited to: (i) New Charter's home page, <https://www.charter.com/browse/content/charter-home> (and successor home pages); (ii) a linkable Web page devoted exclusively to describing (*e.g.*, price and speed) and permitting online purchase of all retail Broadband Internet Access Service standalone options; (iii) any New Charter Web page where Broadband Internet Access Service is sold, marketed, promoted or offered; (iv) any New Charter Web page where a consumer can check the availability of New Charter's services based on service location; (v) the checkout page or shopping cart for purchasing Broadband Internet Access Service; and (vi) any other window, tab, pop-up, or other location where Broadband Internet Access Service is sold, marketed, promoted or offered; and
 - (B) Telephone Sales: If a consumer asks a New Charter representative about the availability of standalone broadband services or broadband services generally, the representative must clearly and accurately describe to the consumer the availability, pricing (both regular and promotional), and speeds for New Charter's standalone Broadband Internet Access Service.
5. Wherever on any of its Websites that New Charter describes or lists any pricing for:
 - (A) standalone Broadband Internet Access Service, video, wireless, or landline phone offerings, it must prominently and clearly disclose both the promotional/introductory price and the regular price outside of any promotional or introductory period of such service; and
 - (B) bundled service offerings, it must prominently and clearly disclose both (i) the promotional/introductory price and the regular price outside of any promotional or introductory period of each such bundled service offering, and (ii) the promotional/introductory price and the regular price outside of any promotional or introductory period for each constituent component of each such bundled service offering on a standalone basis.
6. New Charter shall not make it more difficult or burdensome for a consumer to purchase standalone Broadband Internet Access Service compared to the process for purchasing bundled Broadband Internet Access Service.
7. New Charter shall not make it more difficult or burdensome for a consumer to unbundle to a standalone Broadband Internet Access Service compared to the process for a consumer to

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bundle services (including Broadband Internet Access Service, video, wireless, and landline phone).

8. Starting no later than 30 days after the date of the Commission's approval of the transaction and for the seven-year duration of this condition, New Charter shall run at least one major advertising promotion annually that offers and promotes a standalone 25 Mbps service (or new Commission-defined benchmark broadband speed) or where it is technically not able to offer such speeds, offers and promotes such other speeds suitable for the robust delivery of OTT substitutes.

EXHIBIT B:
DECLARATION OF
ROGER J. LYNCH

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DECLARATION OF ROGER J. LYNCH

I, Roger J. Lynch, being over 18 years of age, swear and affirm as follows:

1. I make this declaration based upon personal knowledge, information, and belief, and in support of the submission of DISH Network Corporation (“DISH”) to the Federal Communications Commission (“FCC”) in connection with the FCC’s review of Charter’s (“Charter’s”) proposed acquisition of Time Warner Cable (“TWC”) and Bright House Networks (“BHN”).

2. I am currently Executive Vice President, Advanced Technologies and International Group for DISH and CEO of Sling TV. Prior to joining DISH, I served as Chairman and CEO of Video Networks International, Ltd., an IPTV company in the United Kingdom that delivered live and on-demand television over its own Digital Subscriber Line (“DSL”) network. Prior to that, I was President and CEO of Chello Broadband, a cable broadband Internet Service Provider (“ISP”) with operations in ten countries across Europe.

3. Based on my years of experience as a senior executive in both the broadband access and online content industries, I believe that the proposed merger of Charter, TWC, and BHN, as currently structured, would cause significant and irreparable harm to emerging competitive online video products and services, as well as the performance of traditional satellite television service, ultimately reducing competition and choice for consumers. Accordingly, I believe that the merger as currently constructed is not in the public interest and should be denied.

4. In this declaration, I will explain why broadband connectivity not only is an integral aspect of a competitive satellite TV service, but critical to the development of over-the-top (“OTT”) video services, a rapidly growing segment of the video industry and a necessary component to maintaining DISH’s competitiveness. I also will explain why the post-transaction entity, called New Charter, will have the incentive to thwart the competitiveness of the DISH

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satellite service and the relatively new Sling TV OTT services in order to enhance its own revenues.

5. Online video is an important component of a competitive multichannel video programming distributor (“MVPD”) service. DISH Network L.L.C. (“DISH Network”) has a proven record as a disruptor in the video industry, spurring its larger rivals to innovate and compete. DISH Network’s leading role in technological innovation, such as developing satellite spot beams to allow local broadcast station carriage on satellite TV, and its marketing innovations, such as offering no up-front cost set-top-box (“STB”) leasing offers, have established us not only as an industry leader but as a catalyst for industry-wide innovation. DISH Network views these online video features as a critical component of its competitive MVPD service. All of these features, however, rely on a broadband Internet connection of sufficient speed and quality. The most advanced digital STBs deployed by DISH Network now include a separate input for broadband. In general, a subscriber must acquire broadband Internet access service from a third-party provider, such as Charter or TWC, and connect that broadband wire into a port in the back of the STB.

6. The broadband connection to the STB is an integral aspect of DISH Network’s ability to compete in the pay-TV business today, not simply an additional feature. Cable enables two-way communications by storing content on servers closer to the customer’s home and splitting nodes within a neighborhood to facilitate on-demand and other interactive services. In contrast, satellite’s point-to-multipoint architecture and lack of a return path necessitates a second connection to the STB via broadband in order to maintain the competitiveness of the DISH Network service.

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7. DISH Network's newest, state-of-the-art STB, the Hopper (as well as certain previous generations of DISH Network STBs) has online features that do not work without a broadband connection. The Hopper provides a DISH Network subscriber with the ability to view live or recorded programming remotely on a personal computer or wireless handheld device. In order for the customer to view programming remotely, the customer must have a broadband connection in the home that the Hopper can use, at the customer's discretion, to send the programming over the Internet to a remote device.

8. The Hopper and other STBs in DISH Network's equipment lineup also offer Internet-delivered Video-on-Demand ("VOD"). To deliver VOD (such as television shows or movies available at any time of the customer's choosing) to the STB, DISH Network cannot rely solely on its satellite architecture, because there would not be enough bandwidth on the satellite beam to carry all the necessary data to serve DISH Network's subscribers' individual programming choices. There also is not enough capacity on each individual STB to store all the movies and television shows that any given customer might want to select. DISH Network therefore stores VOD titles on servers located throughout the U.S. and delivers the programs to the customer's STB through a broadband connection. Thus, a DISH Network subscriber might be watching live video programming from a satellite and then select an on-demand movie or television show, which arrives to the STB through the broadband connection. Once again, this home broadband connection would typically be provided by a cable broadband provider such as Charter or TWC.

9. DISH Network offers these broadband-powered online and VOD services to maintain the competitiveness of its service, reduce churn, and discourage "cord shaving" or "cord cutting"—consumers reducing their use of MVPD services or leaving them altogether.

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Simply put, the broadband-powered elements of DISH Network's service ensure that it can compete more effectively in the pay-TV industry since DISH Network's competitors, including Charter and TWC, all offer similar online services.

10. Without the broadband-powered features of DISH Network's offerings, DISH Network's service would fail to meet consumers' desire for online video and fall behind cable competitors that are able to use their own infrastructure to address this need (*i.e.*, providers that use their own connection to the STB to deliver both traditional video and broadband connectivity). The importance of broadband-powered functionality is necessary today and will only become more critical in the future in order for DISH Network to remain competitive in the pay-TV and online video industries.

11. OTT video. OTT video is becoming a significant force in the overall video industry. We thus see an increasingly challenging path for standalone satellite TV to maintain competitiveness and market share, and as a result, we are investing heavily in OTT video services. Providing OTT services is distinguishable from the need to have broadband-enabled services with DISH Network STBs, as described above. Investing in OTT reflects our belief that consumers, especially the younger generation, increasingly wish to consume video via broadband on any device, at any time, without being tethered to a STB.

12. Earlier this year, DISH launched Sling TV, a new, domestic, OTT live streaming video service. This new OTT service runs entirely over separately provisioned high-speed broadband connections, with no satellite dish required. Consumers can use Sling TV as a substitute for their pay-TV subscriptions entirely.

13. Unlike traditional pay-TV services, subscribing to Sling TV does not require a credit check or contract—instead, consumers access the product on a pay-as-you-go basis,

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making it ideally suited for those who do not have the means or desire to commit to a multi-year contract for pay-TV. Like other OTT services, Sling TV subscribers access their programming through any Internet-connected device, including a tablet, computer, or smart TV.

14. Sling TV is designed to appeal to a segment of the population that wants a slimmer package of channels at a lower price point. Sling TV offers a variety of packages of OTT channels starting at \$20 per month. The Sling TV programming portfolio includes content from Disney/ESPN, HBO, AMC, A&E, Turner, Scripps, EPIX, Univision, and Maker Studios.

15. In addition, Sling Latino offers a suite of standalone and add-on Spanish-language programming packages tailored to English-dominant, bilingual, and Spanish-dominant U.S. Hispanics. Sling International currently provides more than 200 channels in 18 languages across multiple devices to U.S. households.

16. Sling TV is a substitute for a traditional MVPD services, including the video offerings of Charter and TWC. But, a consumer cannot enjoy Sling TV absent the ability to access the Internet through a high-speed broadband service provided by third-party providers, such as Charter and TWC.

17. Thwarting OTT. A combined Charter/TWC would be able to thwart the competitiveness of DISH Network's core satellite service and Sling TV in order to enhance its own revenues. It would be able to do so to a greater extent than either Charter or TWC can today.

18. This is because Charter and TWC operate in different areas, meaning their offerings are substitutes for one another in an OVD's attempt to assemble a mix of broadband ISPs sufficient to reach a critical mass of high-speed broadband subscribers. It is this complement of ISPs that matters. Today, even without uncompromised access to Charter's

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system, an OVD would likely cobble together a sufficient number of other broadband access systems to reach critical mass. After the merger, the option of including either Charter or TWC in the mix will disappear.

19. In addition, this transaction will result in two broadband providers controlling virtually all the nation's high-speed broadband homes—likely close to 90 percent—between them. According to the most recent publicly available data, there are 29.4 million high-speed households in the United States as of December 2013.¹ Of these 29.4 million high-speed homes, 18.6 million were served by Comcast,² while 8.8 million were served by the Applicants here.³

¹ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Implemented by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375, at 28, Chart 1 (Feb. 4, 2015) (“2015 Broadband Progress Report”) (reporting the 25/3+ Mbps subscriber total for 2013 as 29.4 million subscribers). See also Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, MB Docket No. 15-149, at 6 FN 10 (filed June 25, 2015).

² Comcast has stated that the “over 90%” of its subscribers have 25/3+ Mbps or faster service. David L. Cohen, *Traveling to the Tar Heel State to Talk About Media Democratization and What the TWC Deal Means for North Carolina*, Comcast Voices (Mar. 25, 2015), <http://corporate.comcast.com/comcast-voices/traveling-to-the-tar-heel-state-to-talk-aboutmediademocratization-and-what-the-twc-deal-means-for-north-carolina> (“[O]ver 90% of our customers subscribe to speeds of 25 Mbps or higher. . . .”). I have therefore assumed that 90% of Comcast's total broadband subscribers for 2013 received 25/3+ Mbps service. This is approximately 18,595,800 million subscribers (90% * 20,662,000 = 18,595,800). See Press Release, 2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013, Leichtman Research Group (Mar. 17, 2014), <http://www.leichtmanresearch.com/press/031714-release.html> (reporting Comcast had 20,662,000 subscribers by the end of 2013).

³ According to the most recent report from the FCC (based on 2013 data), 29.4 million consumers subscribe to 25/3+ Mbps services. Charter has stated New Charter will serve “less than 30%” of the country's 25/3+ Mbps customers. This is approximately 8,820,000 subscribers (30% * 29.4 million = 8,820,000). *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Implemented by the Broadband Data Improvement Act*,

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Therefore, 27.4 million of the country's 29.4 million high-speed broadband homes would be controlled by two companies as a result of this transaction, based on data from 2013. I recognize that accounting for 2014 growth in high-speed households could increase the number of total high-speed households and thus may decrease the share held by the two companies, but I would still expect this share to be close to 90 percent.

20. Thus, as a result of this transaction, New Charter and Comcast will not need to collude in order to bring their collective weight to bear on an OVD. Indeed, parallel action by both of the two largest ISPs in the nation (Comcast and New Charter) would assure the destruction of an OVD such as Sling TV much faster and more definitely than parallel action by the two largest providers today, since it would lead to greater losses and cut off more decisively any hope of reaching break-even. Specifically, if the merger is not consummated, the two largest ISPs would be Comcast and TWC, thus excluding the high-speed homes served by Charter and BHN.

21. Sling TV's OTT services are particularly vulnerable to blocking and discrimination on the broadband pipe because they can entirely replace traditional pay-TV services. If Charter or TWC degraded the quality of a Netflix or Amazon subscriber, the customer could, at least, continue watching her cable TV service for linear video, such as sports, news, or broadcast network programming. But, a Sling TV consumer ideally subscribes to a

2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375, at 28, Chart 1 (Feb. 4, 2015) ("2015 Broadband Progress Report") (reporting the 25/3+ Mbps subscriber total for 2013 as 29.4 million subscribers); Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, MB Docket No. 15-149, at 6 (filed June 25, 2015) ("Charter-TWC Application") (stating "New Charter will have . . . less than 30% of wireline broadband customers receiving speeds equal to or greater than 25 Mbps").

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residential broadband service and then turns to the online-only Sling TV service for nearly all of her television-viewing needs. This poses a substantial competitive threat to Charter and TWC and presents a particularly attractive target for New Charter to sabotage.

22. New Charter would therefore have an acute incentive to thwart the quality of Sling TV. This would have a substantial negative impact on our ability to serve our customers and impose competitive pressure on New Charter. New Charter could sufficiently degrade Sling TV's service so that the consumer would be more easily persuaded to drop the DISH service in favor of New Charter-provided linear video programming service.

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The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief. Executed on October 13, 2015.

A handwritten signature in black ink, appearing to read 'R. Lynch', written over a horizontal line.

Roger Lynch

Executive Vice President, Advanced
Technologies and International Group for
DISH Network Corporation and
CEO of Sling TV

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CERTIFICATE OF SERVICE

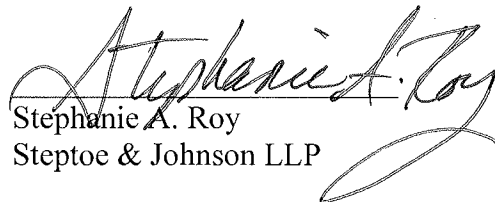
I, Stephanie A. Roy, hereby certify that on October 13, 2015, I caused true and correct copies of the foregoing to be served by first class mail upon the following counsel:

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Sincerely,


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